(15)

No. 06-5754

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

VICTOR A. RITA, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

JOINT APPENDIX: VOLUME I OF II

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December 18, 2006

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
(CHARLOTTE)

[Filed: 04/28/2004]

Case No. 3:04-cr-00105

UNITED STATES OF AMERICA,
Appellant,

v.

VICTOR A. RITA, JR.,
Defendant.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
04/28/2004	1	INDICTMENT as to Victor A. Rita (1) count(s) 1, 2, 3 (former emp) (Entered: 04/29/2004)
		* * * *
06/01/2004	4	ORDER Setting Conditions of Release as to Victor A. Rita Jr. (Signed by Magistrate Judge Carl Horn III) (mga) (Entered: 06/02/2004)
		* * * *
07/12/200		Arraignment as to Victor A. Rita Jr. held Judge: horn Court Rptr: tob FTR AUSA: Wilson (tob) (Entered: 07/12/2004)
		* * * *
11/08/2004		ORAL ORDER as to Victor A. Rita Jr. denying [25-1] motion for Judgment of Acquittal as to Victor A. Rita (1) (Entered by Judge William L. Osteen) (ssh) (Entered: 11/09/2004)

DATE	NO.	PROCEEDINGS
11/09/2004		Jury trial as to Victor A. Rita Jr. held Judge: Osteen Court Rptr: Kelly (ssh) (Entered: 11/09/2004)
11/09/2004	26	JURY VERDICT as to Victor A. Rita Jr. Guilty: Victor A. Rita (1) count(s) 1, 2, 3, 4, 5 (ssh) (Entered: 01/25/2005)
		* * * *
06/03/2005	27	MOTION for downward Departure by Victor A. Rita, Jr. (Hankins, Susan) (Entered: 06/03/2005)
06/07/2005		Minute Entry for proceedings held before Judge William L. Osteen :Sentencing held on 6/7/2005. Party Victor A. Rita, Jr terminated., Victor A. Rita, Jr terminated. (Court Reporter Jill Simpson w/ Huseby.) (Hankins, Susan) (Entered: 06/09/2005)
		* * * *
06/18/2005	29	NOTICE OF APPEAL by Victor A. Rita, Jr. And request to waive filing fee and appoint counsel. No fee paid. (Barber, Suzanne) (Entered: 06/23/2005)
		* * * *
06/27/2005	32	ADDITIONAL NOTICE OF APPEAL by Victor A. Rita, Jr (Barber, Suzanne) (Entered: 07/06/2005)
		* * * *
07/01/2005	31	JUDGMENT as to Victor A. Rita, Jr. (1), Count(s) 1, 33 mos imp + 3 yr SRT + $100 assess; Count(s) 2, 33 mos imp + 3 yr SRT + $100 assess; Count(s) 3, 33 mos imp + 3 yr SRT + $100 assess; Count(s) 4, 33 mos

DATE	NO.	PROCEEDINGS
		imp + 3 yr SRT + $100 assess; Count(s) 5, 33 mos imp + 3 yr SRT + $100 assess Signed by Judge William L. Osteen on 7/1/05. (Hankins, Susan) (Entered: 07/01/2005)
		* * * *
08/25/2005	37	ORDER as to Victor A. Rita, Jr vacating 36 Order on Motion for Leave to Appeal In Forma Pauperis; the deft's appl. to file a notice of appeal in forma pauperis is GRANTED. Signed by Judge Graham Mullen on 8/25/05. (Koechley, Jeanie) (Entered: 08/26/2005)
08/30/2005	38	JUDGMENT as to Victor A. Rita, Jr. (1), Count(s) 1, 33 mos imp + 3 yr SRT + $100 assess; Count(s) 2, 33 mos imp + 3 yr SRT + $100 assess; Count(s) 3, 33 mos imp + 3 yr SRT + $100 assess; Count(s) 4, 33 mos imp + 3 yr SRT + $100 assess; Count(s) 5, 33 mos imp + 3 yr SRT + $100 assess . Signed by Judge William L. Osteen on 8/30/05. (Hankins, Susan) (Entered: 09/06/2005)
10/07/2005	39	4th Circuit NOTICE as to Victor A. Rita, Jr regarding 4th Circuit appoints federal public defender at Greensboro (MacEwan, Cathy) (Entered: 10/07/2005)
		* * * *
10/24/2005	43	ORDER granting 41 MOTION for Release Pending Appeal filed by Victor A. Rita, Jr. Signed by Judge Graham Mullen on 10/24/05. (MacEwan, Cathy) (Entered: 10/26/2005)

DATE	NO.	PROCEEDINGS
		* * * *
11/28/2005		TRANSCRIPT filed as to Victor A. Rita, Jr for dates of 11/8/04 and 11/9/04—Trial Testimony and Jury Instructions before Judge William Osteen. Court Reporter: Joy Kelly. (MacEwan, Cathy) (Entered: 11/29/2005)
12/09/2005		TRANSCRIPT of Sentencing Proceedings as to Victor A. Rita, Jr held on June 7, 2005 before Judge William L. Osteen. Court Reporter: Jillian Simpson w/Huseby, Inc.. (Anderton, Michelle) (Entered: 12/09/2005)
		* * * *
11/14/2006	54	ORDER granting 53 Motion for Extension of Time to Report to BOP to June 30, 2007 as to Victor A. Rita Jr. (1). Signed by Judge Graham Mullen on 11/14/2006. (jlk) (Entered: 11/14/2006)
		* * * *

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed 6/28/2005]

Docket No. 05-4674

UNITED STATES OF AMERICA,
Plaintiff—Appellee,

v.

VICTOR A. RITA, JR.,
Defendant—Appellant.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
6/28/05	Criminal case docketed. (rhs)
	* * * *
10/5/05	ORDER FILED [4265496] appointing Federal Public Defender as counsel for Appellant Victor A. Rita. Copies to all parties. ~ [4265496] [05-4674] (rhs)
	* * * *
5/1/06	Unpublished per curiam opinion filed. Copies to all parties. [05-4674] (rhs)
5/1/06	Judgment order filed. Decision: Affirmed. . EOD Date: 5/1/06. ~ [4383690] [05-4674] (rhs)
5/23/06	Mandate issued. ~ [4397198] [05-4674] (dhb)
8/17/06	Supreme Court notice that petition for certiorari was filed on 07/28/06. Spct No.: 06-5754 Spct Pty 1: Victor A. Rita Spct Pty 2: United States. [05-4674] ~ [4445432] (mst)

DATE	PROCEEDINGS
11/13/06	Supreme Court order received granting petition certiorari [4445432-1] on 11/03/06. [05-4674] ~ [4492321] (mst)

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

[Filed APR 28, 2004]

DOCKET NO. 3: 04 CR 105

UNITED STATES OF AMERICA,

vs.

VICTOR A. RITA, JR.

BILL OF INDICTMENT

Violations:

18 U.S.C. § 1001
18 U.S.C. § 1503
18 U.S.C. § 1623

THE GRAND JURY CHARGES:

At the specified times and at all relevant times:

Introduction

1. From in or about March 2002 through in or about February 2004, a grand jury of the United States in the Western District of North Carolina (hereafter, "the Grand Jury"), in conjunction with the federal Bureau of Alcohol, Tobacco, Firearms and Explosives (hereafter, "ATF"), was conducting an investigation into the sale of, among other things, PPSH 41 machinegun "parts kits" by a company (hereafter, "the Company") located in Union County, in the Western District of North Carolina.

2. In or about January of 2003, defendant VICTOR A. RITA, JR. purchased two firearms "parts kits" from the Company, one of which was a PPSH 41 machinegun "parts kit" and the other of which was an RPK "parts kit."

3. In or about April of 2003, ATF began a nationwide recall of the PPSH 41 "parts kits" sold by the Company in furtherance of the investigation of the Company. During the course of this recall, ATF learned that, on at least one occasion, a purchaser of one of the Company's PPSH "parts kits" spoke by telephone to an employee of the Company after receiving notice of the recall and was informed that the purchaser need not surrender the kit to ATF pursuant to the recall.

4. As part of the recall, ATF Special Agent Bonnie Levin (hereafter, "Agent Levin") spoke by telephone to defendant RITA at or about 8:26am on or about September 4, 2003, concerning the surrender of the PPSH "parts kit" that defendant RITA had purchased from the Company. During this telephone conversation, defendant RITA advised that he would surrender his PPSH "parts kit" to Agent Levin at her office in Miami, Florida the following week.

5. At or about 10:05am on or about September 4, 2003, defendant RITA placed an approximately four-minute telephone call to the Company.

6. On or about September 6, 2003, defendant RITA shipped the PPSH "parts kit" back to the Company rather than surrendering it to ATF as he had advised Agent Levin that he would do. Thereafter, defendant RITA delivered his RPK "parts kit" to his attorney for surrender to Agent Levin.

7. On or about September 10, 2003, defendant RITA's attorney contacted Agent Levin to inform her that he was in possession of a "parts kit," and Agent Levin agreed to meet defendant RITA's attorney and take possession of the "parts kit."

8. On or about September 17, 2003, Agent Levin arrived at the office of defendant RITA's attorney expecting to take possession of the PPSH "parts kit" that defendant RITA had agreed to surrender to her. After examining the RPK "parts

kit" that defendant RITA had delivered to his attorney, Agent Levin advised defendant RITA's attorney that the "parts kit" was not, in fact, the PPSH "parts kit."

9. On or about October 8, 2003, a federal grand juiy subpoena was served for defendant RITA, compelling him to appear before the Grand Jury in order to explain the reason that he had returned his PPSH "parts kit" to the Company.

COUNT ONE

10. The Grand Jury realleges and incorporates by reference herein all of the allegations contained in paragraphs 1 through 9 of the Indictment, and further alleges that:

11. On or about October 27, 2003, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, the defendant,

VICTOR A. RITA, JR.

while under oath and testifying in a proceeding before the Grand Jury, knowingly made a false material declaration, that is to say:

12. At the time and place aforesaid, the Grand Jury was conducting an investigation to determine whether violations of Title 18, United States Code, Section 922(o) had been committed with regard to the PPSH 41 machinegun "parts kit" distributed by the Company, and to identify the persons who had committed, caused the commission of, and conspired to commit such violations. In addition, the Grand Jury was investigating whether the Company had attempted to obstruct said investigation, in violation of Title 18, United States Code, Sections 1503, 1510, and 1512. It was material to said investigation that the Grand Jury ascertain why defendant RITA failed to surrender his PPSH 41 machinegun "parts kit" to ATF agents as requested and instead returned said "parts kit" to the Company.

13. At the time and place alleged, defendant RITA, appearing as a witness under oath at a proceeding before the Grand Jury, knowingly made the following declaration in response to questions with respect to the material matter alleged in paragraph 12 above:

> "Q: Do you have—have you placed any telephone calls to [the Company] since the time you purchased the parts kit in January of 2003?"
> "A: Yes, sir. I already told you I did."
> "Q: Those were the ones where you called them up after you had sent the parts kit back?"
> "A: Correct."
> "Q: Did you have any other conversations with them over the telephone?"
> "A: No, sir."

14. The aforesaid underscored testimony of defendant RITA, as he then and there well knew and believed, was false in that he spoke to agents and employees of the Company by telephone on or about September 4, 2003, prior to shipping the PPSH 41 machinegun "parts kit" back to the Company on or about September 6, 2003.

All in violation of Title 18, United States Code, Section 1623(a).

COUNT TWO

15. The Grand Jury realleges and incorporates by reference herein all of the allegations contained in paragraphs 1 through 14 of the Indictment, and further alleges that:

16. On or about October 27, 2003, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, the defendant,

VICTOR A. RITA, JR.

in a matter within the jurisdiction of the executive, legislative, and judicial branch of the Government of the United States,

knowingly and willfully made a materially false, fictitious, and fraudulent statement and representation as set forth in paragraph 13 above, all in violation of Title 18, United States Code, Section 1001(a)(2).

COUNT THREE

17. The Grand Jury realleges and incorporates by reference herein all of the allegations contained in paragraphs 1 through 16 of the Indictment, and further alleges that:

18. On or about October 27, 2003, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, the defendant,

VICTOR A. RITA, JR.

while under oath and testifying in a proceeding before the Grand Jury, knowingly made a false material declaration, that is to say:

19. At the time and place alleged, defendant RITA, appearing as a witness under oath at a proceeding before the Grand Jury, knowingly made the following declaration in response to questions with respect to the material matter alleged in paragraph 12 above:

"Q: Sir, did you have any discussions with the agent about the PPSH parts kit?"
"A: None at all."
"Q: You're absolutely positive about that as you sit here today?"
"A: Yes. sir."
"Q: Did the agent ever ask you to return the PPSH parts kit?"
"A: No, sir. She asked me to surrender the RPK kit."
"Q: There's no question in your mind about that?"
"A: About surrendering the RPK kit?"
"Q: About which kit she asked you to surrender."
"A: No, sir."

20. The aforesaid underscored testimony of defendant RITA, as he then and there well knew and believed, was false in that Agent Levin, with whom defendant RITA spoke, discussed the PPSH parts kit with him, asked him to surrender the PPSH parts kit, and did not ask him to surrender the RPK parts kit.

All in violation of Title 18, United States Code, Section 1623(a).

COUNT FOUR

21. The Grand Jury realleges and incorporates by reference herein all of the allegations contained in paragraphs 1 through 20 of the Indictment, and further alleges that:

22. On or about October 27, 2003, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, the defendant,

VICTOR A. RITA, JR.

in a matter within the jurisdiction of the executive, legislative, and judicial branch of the Government of the United States, knowingly and willfully made a materially false, fictitious, and fraudulent statement and representation as set forth in paragraph 19 above, all in violation of Title 18, United States Code, Section 1001(a)(2).

COUNT FIVE

23. The Grand Jury realleges and incorporates by reference herein all of the allegations contained in paragraphs 1 through 22 of the Indictment, and further alleges that:

24. On or about October 27, 2003, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, the defendant,

corruptly influenced, obstructed and impeded, and endeavored to influence, obstruct and impede the due administration of justice by providing and causing to be provided false and misleading information to the Grand Jury, all in violation of Title 18, United States Code, Section 1503.

A TRUE BILL

/s/ Bārbara McBryde
FOREPERSON

ROBERT J. CONRAD, JR.
UNITED STATES ATTORNEY

/s/ Matthew T. Martens
MATTHEW T. MARTENS
ASSISTANT UNITED STATES ATTORNEY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

3:04CR105
NOVEMBER 8 & 9, 2004

UNITED STATES OF AMERICA,
Plaintiff,

vs.

VICTOR A. RITA, JR.,
Defendant.

TRANSCRIPT OF TRIAL TESTIMONY AND JURY INSTRUCTIONS BEFORE THE HONORABLE WILLIAM L. OSTEEN UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE UNITED STATES	MATTHEW T. MARTENS, ESQ. U. S. Attorney's Office 227 W. Trade Street Suite 1700 Charlotte, NC 28202
FOR THE DEFENDANT	DENZIL H. FORRESTER, ESQ. P.O. Box 32511 Charlotte, NC 28232

* * * *

[4] (Court called to order and defendant present in courtroom.)

THE COURT: Now we're ready to proceed with our matter here, so you may bring them back in, please.

(Jury enters courtroom at 1:52 p.m.)

THE COURT: Ladies and gentlemen, thank you for your patience. I said there was another matter that may come up at 1:30 that would require some time. We have been able to get that matter worked out, so we could proceed here and now and thank you for being patient with us.

The government may call its first witness.

MR. MARTENS: The United States calls ATF Agent John Schroepfer.

JOHN SCHROEPFER

being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MARTENS

Q Good afternoon, sir.

A Good afternoon.

Q Could you please introduce yourself to the jury.

A My name is John Schroepfer. I'm with the Bureau of Alcohol, Tobacco and Firearms and Explosives, a special agent.

Q How long have you been a special agent with the Bureau of Alcohol, Tobacco and Firearms?

[5] A I have been working for ATF since September of 2000.

Q And where are you currently stationed?

A I'm currently stationed in Charleston, South Carolina.

Q Do you have any particular area of specialization within ATF?

A No, sir. I'm a special agent, and I specialize in enforcing the gun laws, explosives laws, and the Arms Export Control Act, the import provisions of that.

Q Prior to joining ATF in 2000, what were you doing for employment prior to that?

A I worked as a U. S. Customs officer serving in ports of Detroit, Michigan and Jacksonville, Florida.

Q How long all told have you been a law enforcement officer?

A Approximately 15 years.

Q Is there any type of educational training you needed in order to be a law enforcement officer?

A Yes, sir. Including the basic training that all ATF agents have to go through, such as criminal investigator, basic training courses, ATF National Academy, it's a 13-week resident program which teaches the Gun Control Act, National Firearms Act, and explosives laws as they relate to the laws that ATF has to enforce.

Q I want to direct your attention back to the 2001, 2002, and 2003 time frame and ask if you were involved in an [6] investigation of a company known as Interordnance of America?

A Yes, sir.

Q And how was it you came to be involved in that investigation of Interordnance?

A Yes, sir. The Interordnance of America investigation was a federal grand jury investigation which initiated in September of 2001 down in Charleston, where I'm stationed.

Based on referral from the Customs Service regarding machine gun parts that were imported into the United States, which caused ATF and the U. S. Customs Service to initiate a criminal investigation regarding the practices of Interordnance of America, it's a licensed importer and licensed firearms dealer that's located in Monroe, North Carolina.

Q And when you first got this call, what did you do? When you first got this call from Customs that you referred to?

A Yes, sir. My initial activity was my office received a call from Customs and my supervisor sent me to the port to collect a sample of a parts kit that had been imported. And that particular date was an FNFAL varient, it was a British L1A189 machine gun parts kit, a shipment of them that

had been—1800 I believe was the quantity, that was being shipped into the Port of Charleston.

[7] I went to the port and took a sample of the parts and sent them to our technology branch. And that eventually resulted in an investigation being opened, which caused the U. S. Attorney's Office here in North Carolina to open up a grand jury investigation to further collect evidence to find out what exactly was going on with Interordnance of America and their principal officers and employees.

Q Were there particular firearms that were the subject of your investigation of Interordnance?

A Yes, sir. There was three particular firearms that ATF and the U. S. Customs Service were looking into investigating. And those particular firearms, one was the PPSh-41, which came on later on in the investigation, and the British L1A1, or the FAL varient type, which was the firearm that initiated the beginning of the investigation. And there was another firearm called a Styer MP69. So of the three, there was three different types, but today we're talking, the gun you'll see today is a PPSh-41.

MR. FORRESTER: Objection.

MR. MARTENS: We'll get to that in a second.

THE COURT: Okay. Overruled—I mean sustained.

Do not consider the last part of that answer, ladies and gentlemen.

BY MR. MARTENS

Q At any time did your investigation involve a gun known [8] as an RPK?

A No, sir.

Q Now, you indicated just a moment ago at some point the investigation turned to a PPSh-41. Is that correct?

A Yes, sir.

Q How is the investigation turned to the Russian PPSh-41?

A During the course of our investigation, ATF received a citizen complaint from Nancy Vogel, who is a resident of Maryland. And she received a parts kit she did not order in the mail, which caused an agent to respond to her residence and collect that PPSh-41 parts kit.

And he submitted that to our technology branch for examination. And after examination, the technology branch classified that as a machine gun under federal law which then led to the PPSh parts kit being added to this—already ongoing investigation.

Q Can you tell the jury when was it that the investigation turn to the PPSh-41 parts kit?

A A specific date, I don't remember—

Q Just roughly.

A —a specific date. But it was in 2003.

Q Can you tell the jury what is a PPSh-41 machine gun.

MR. FORRESTER: Objection, Your Honor.

THE COURT: Basis.

MR. FORRESTER: Foundation.

[9] THE COURT: All right. I'll sustain it for that.

BY MR. MARTENS

Q Sir, during your time at ATF, have you become familiar with various firearms?

A Yes, sir.

Q And have you actually seen a PPSh-41?

A Yes, sir, I have.

Q How many PPSh-41s have you seen, roughly?

A PPSh-41s that I've seen assembled, probably 50 to 100. In parts form, thousands.

Q Would you recognize a PPSh-41 if you saw it?

A Yes, sir.

Q And can you tell the jury what a PPSh-41 is.

A A PPSh-41 is a select fire submachine gun.

MR. FORRESTER: Objection, Your Honor.

THE COURT: Is that still foundation?

MR. FORRESTER: If I can be heard outside the presence of the jury. Yes, it is, the answer to your question.

THE COURT: Well, if it's foundation, then I'll overrule it. You may answer the question.

THE WITNESS: Yes, sir.

A PPSh-41 is a model of a select fire submachine gun. It was a World War II vintage battle rifle that was used by various militaries during World War II.

[10] BY MR. MARTENS

Q Now, this investigation that was being conducted, who was actually conducting the investigation of Interordnance with regard to PPSh-41s? Were you personally involved?

A Yes, sir.

Q Were there other agents involved?

A Yes, sir.

Q Were witnesses called before the grand jury?

A Yes, there was.

Q Do you know who some of the witnesses called before the grand jury were?

A Yes, sir. There were witnesses, in addition to government agents, that were called before the grand jury was previous Firearms Technology branch chief, retired from ATF, his name is Edward Owen. He used to be the branch chief of that branch. Interordnance employees were called before the grand jury, as well as customers. Mr. Victor Rita, who sits at defense table, was also called as a witness before the grand jury regarding the PPSh-41 machine guns.

MR. MARTENS: Your Honor, if I may approach the witness?

THE COURT: You may.

BY MR. MARTENS

Q I'd like you to looke [sic] at what has previously been [11] marked as Government's Exhibit 11. Ask if you recognize that.

(Hand document to witness.)

A Yes, I do.

Q What is Government's Exhibit 11?

A This exhibit is a transcript from the grand jury testimony of Mr. Edwin Owen, who I mentioned earlier, a retired firearms expert that previously worked for the ATF in Washington, D.C. It has his name on it, that's how I know.

MR. MARTENS: Your Honor, we have a stipulation this is a true and correct copy and defense counsel has stipulated to that, so we would ask to move Government's Exhibit 11 into evidence.

THE COURT: Any objection?

MR. FORRESTER: No, Your Honor.

THE COURT: It's admitted.

Ladies and gentlemen, it is stipulated and agreed by the parties that this is an exact transcript of the testimony given by Agent Owen. You may proceed.

(Government's Exhibit No. 11 received.)

BY MR. MARTENS

Q Could you tell the jury what the date is that Edwin Owen testified before the grand jury?

A Yes, sir. The date on the cover is dated May 6th, [12] 2003.

Q Prior to being in court today, have you had the opportunity to review Agent Owen's testimony as contained in Government Exhibit 11?

A Yes, sir, I have reviewed Mr. Owen's testimony.

Q Did he testify about a particular firearm?

A Yes, sir. As you can see, the testimony was very thick. He was in the grand jury for a long time. And it's my recollection that all three firearms that we were investigating were shown to Mr. Owen, and by reviewing the transcript, I verified that he made comments on all three of the guns during the course of his testimony in front of the grand jury.

Q When you say all three of the guns, does that include specifically the PPSh-41?

A Yes, sir, it does.

Q Was he the only grand jury witness called with regard to the PPSh-41?

A No, sir.

Q Did there come a time when a decision was made to—well, let me actually—strike that for a second.

Were you involved in what was called a recall of the PPSh-41?

A Yes, sir.

Q Can you explain to the jury what exactly a recall of [13] the PPSh-41 is?

A Yes, sir. The recall involved the PPSh-41 and also the other two firearms that I spoke of earlier.

MR. FORRESTER: Objection, Your Honor.

THE COURT: You were referring specifically to the PPSh-41, weren't you?

MR. MARTENS: I believe I did ask was he involved in the recall of the PPSh-41.

THE COURT: Yes. I strike it as to the other guns at this point.

BY MR. MARTENS

Q Let me ask you this: Were you involved in a recall as part of your investigation of Interordnance?

A Yes, sir.

Q And when did that recall occur?

A The recall was initiated in April of 2003.

Q And can you explain to the jury what the recall involved?

A Yes, sir.

The recall involved ATF agents actually contacting the customers that purchased the firearms parts kits that ATF had in question and was under investigation.

The experts at our technology branch had determined that those three particular types of firearms were classified as machine guns, which would cause them to have [14] to be registered. And due to the fact they were not registered, it was decided that ATF, if we knew who purchased those items, to make an effort to contact those customers and collect those parts kits back. That was the gist of the recall and it did include all three of the firearms that I mentioned.

Q Again, when you say all three, what are all three for the jury?

A The Styer MP69 which is a small pistol-looking like machine gun. The FNFAL Imbell, FNFAL rifle, which is a very large battle rifle. And the PPSh-41, which is the select fire submachine gun that we're talking about here in this case.

Q Are you familiar with a gun known as an RPK?

A No, sir, I'm not familiar with an RPK.

Q Was an RPK part of the recall?

A No, sir.

Q Did there come a time when a decision was made to call the defendant, Victor Rita, to the grand jury?

A Yes, sir.

Q Were you involved in that decision?

A Yes, I was.

Q Why was Mr. Rita called to the grand jury?

A Mr. Rita was called to the grand jury—the decision was made after I was contacted with ATF Special Agent Bonnie [15] Levin. She is assigned to the Miami Field Division, nearby where the defendant, Mr. Rita, resides.

During the course of our investigation—can I speak to how we found these people, Your Honor?

THE COURT: Not unless it is part of the response that has been asked here. That is, was he called to the grand jury.

MR. MARTENS: Well, my question actually, Your Honor, was why was he called to the grand jury.

THE COURT: Why was he called. Okay. You may explain why he was called.

THE WITNESS: He was called after Agent Levin had contacted me.

The way we sent the recall out is we actually provided invoices to the agents in the field that we knew had purchased these three firearms in question. Well, Agent Levin received a package, a request from the Charlotte Field Division, who Charleston falls under, which is the office above where I work. The Charleston Field Division sent these packages out and included a memo explaining that the Firearm Technology Branch had classified these as machine gun. They were unregistered. They have to be collected, is basically what it said. And it also included an invoice from the company of Interordnance, with the person's name who purchased it and their address.

[16] Agent Levin called me and informed me that she had made contact with the defendant, Victor Rita, for the purpose of collecting that PPSh-41 parts kit that was listed on the invoice. And through my conversation with Agent Levin, I learned that the defendant, Victor Rita, sent the PPSh-41 parts

kit back to Interordnance, who was the subject of our investigation, rather than turn that evidence in to ATF.

During the course of my investigation I learned that he wasn't the only person that this same set of circumstances had applied to.

So we felt it was important and I felt it was important that the grand jury know why that article was sent back rather than surrendered to ATF. And if there was any conversation with anybody in particular at Interordnance, if there was any person there that was actually directing people not to turn the evidence in to the government, and rather send it back to the subject of the investigation, I felt that was important for the grand jury to know.

Q At the time a decision was made to call Victor Rita as a grand jury witness, did you have information that other people had had conversations with Interordnance?

A Yes, sir.

Q What was that information that you possessed at the time?

* * * *

[121] MR. FORRESTER: If I go over 25 minutes, I'd like either that or for somebody to either whisper—

THE COURT: How about if I just give you the hook? (Laughter)

We'll notify you—would you do a favor, about 9:30 or a few minutes after that, if you would tell that jury that we're finishing up a matter and we'll be with them very shortly. (Referring to another jury deliberating on another case.)

COURT SECURITY: Yes, sir.

THE COURT: All right. You may bring the jury back in, please.

(Jury enters courtroom at 8:34 a.m.)

(Closing arguments of counsel.)

THE COURT: Thank you, Mr. Martens.

Gentlemen, as I prepare to instruct the jury, if you would look at your instructions under the offenses set out, you will find a heading that says Count One, about the declarations and unanimous agreement. Do you see that page?

MR. FORRESTER: Yes, I do.

MR. MARTENS: I'm sorry. Can you describe that page again?

THE COURT: It says "Count One" and it refers to declarations and unanimous agreement.

MR. MARTENS: Yes, Your Honor.

[122] THE COURT: All right. That really should refer to Count Three where there are two separate allegations, and so I've changed that to Count Three when I get to it.

Now, ladies and gentlemen, you have heard all the evidence in this case, as well as the closing arguments on behalf of both the parties. It becomes my duty, therefore, to instruct you on the law that you must follow and apply in arriving at your verdict in this case.

It's my duty to preside over the trial and to determine what testimony and evidence are relevant for your consideration, and then at the end of the trial, it's also my duty to instruct you on the law applicable in the case.

You, as jurors, are judges, judges of the facts. But in determining what actually happened in this case, that is in reaching your decision as to the facts, it's your sworn duty to follow the law as I now am in the process of defining for you, and you must follow all my instructions as a whole.

You have no right to disregard or to give special attention to any one instruction that I may state for you. That is, you

must not substitute or follow your own notion of what the law is or what you think the law ought to be. It's your duty to apply the law as I give it to you regardless of the consequences.

By the same token, it's also your duty to base [123] your verdict solely upon the testimony and evidence in this case without prejudice and without sympathy. That was the promise you made and the oath you took before being selected as jurors in this case, and both sides have a right to expect nothing less from you.

The indictment, which I will go over again in a few moments with you, in this case is not evidence of guilt. Indeed, a defendant is presumed through the law to be innocent. The law does not require a defendant to prove his innocence or to produce my evidence at all. And no inference whatever can be drawn from the election of a defendant not to testify.

The government has the burden of proving him guilty beyond a reasonable doubt, and if it fails to do so, then you must acquit him.

Thus, while the government's burden of proof is a strict or heavy burden, it is not necessary that the defendant's guilt be proved beyond all possible doubt. It's only required that the government's evidence exclude any reasonable doubt concerning the defendant's guilt.

As stated to you earlier, it's your duty to determine the facts, and in so doing, you must consider only the evidence that I've admitted into the case.

The term "evidence" includes the sworn testimony of the witnesses, the exhibits admitted into the record, and [124] any stipulations, and you'll recall specifically that closing arguments do not constitute evidence in the case.

Remember that any statements, objections, or arguments made by the lawyers do not constitute evidence. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing, to call your attention to certain facts or inferences which might otherwise escape your notice.

It is for you to determine what the facts are, and it is not for the lawyers to engage your passions or to inflame your prejudices or to try to command your sympathies. You must, in a cool and calm manner, make your decisions based upon what you find the facts to be. So it's your own recollection and interpretation of the evidence that controls. What the lawyers say, as I've already said, is not binding upon you.

Also during the course of the trial I might have asked a question or perhaps admonished a witness about the manner in which he or she should respond to the questions of counsel. Do not assume from anything that I may have said that I have any opinion concerning the issues which are for you, except for my instructions to you on the law. You should disregard anything that I may have said during the trial in arriving at your own findings as to the facts.

[125] So while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense leave you to draw from the facts which have been established by the testimony and the evidence in this case.

You also may consider either direct or circumstantial evidence. Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating either the guilt or innocence of the defendant. The law makes no distinction between the weight

that you shall give to evidence, whether it's direct or circumstantial. What the law does require is that you consider all of the evidence and that you be convinced of the defendant's guilt beyond a reasonable doubt before any defendant can be convicted.

Now, I've said that you must consider all of the evidence. This does not mean, however, that you must accept all the evidence as true or accurate.

You're the sole judges of the credibility or believability of each witness who has testified in this case. But in weighing the testimony of that witness, you [126] should consider that witness's relationship to the government or to the defendant; the interest, if any, in the outcome of the case; the manner of testifying; the opportunity to observe and acquire knowledge about the facts to which the witness has testified; the candor and the fairness of the witness; the extent to which the witness has been corroborated by other credible evidence, and whether there were material inconsistencies within the witness's own testimony at trial.

If you find that a witness has contradicted himself or been contradicted by other credible evidence, then you should decide what weight, if any, that witness's testimony is entitled to.

Inconsistencies or discrepancies, though, in the testimony of any witness and between the testimony of different witnesses, may or may not cause the jury to discredit that testimony. Two or more persons witnessing an event or an incident may see it entirely differently. And innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the testimony, the effect of that discrepancy, you should always consider whether it pertains to a matter of importance or merely an unimportant detail, and whether the discrepancy resulted from innocent error or intentional falsehood.

You may, ladies and gentlemen, in short, accept or [127] reject the testimony of any witness in whole or in part.

Also the weight of the evidence is not necessarily determined by the number of witnesses testifying as to any particular fact. You could find the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

You will recall that there were several exhibits introduced into evidence, ladies and gentlemen, which are called stipulations. Those stipulations, they're agreements as to those particular facts. This means that both sides accept those facts as true, so there's no need for further evidence from either side on that point. You may accept those stipulations of fact as true, even though nothing further was done to support those stipulations.

I'll find the indictment here in just a moment.

Ladies and gentlemen, there are five separate counts in this indictment. All five of them essentially regard the same activity.

But in Count One, after some preliminary statements, Count One charges that on or about October 27th of 2003 in Mecklenburg County, that the defendant, Victor A. Rita, Jr., while under oath and testifying in a proceeding before the grand jury, knowingly made a false material declaration. That is to say—and then it refers to the testimony, and specifically the testimony which is alleged [128] to be false is underlined. And it's in this grouping of questions and answers, and the question ultimately is—well, let me just read them all. "Have you placed any telephone calls to the company since the time you purchased the parts kit in January of 2003?" And the answer is, "Yes. I've already told you I did." Then the question is, "Those were the ones where you called them after you have had sent the parts kit back." And the answer is, "Correct." And the next question is, "Did you have any other

conversations with them by telephone?" And the answer—this is the underlined part which the government contends is inaccurate: "Answer: No, sir."

So that's what's alleged in Count One to be perjurious testimony. That's brought under Title 18, U. S. Code, Section 1623. And that part of the law says that whoever under oath in any proceeding before any grand jury of the United States knowingly makes any false material declaration shall be guilty of an offense against the United States.

Now, I also refer at this point to Count Three, which is a similar charge under Section 1623. And it is alleged in Count Three, after a series of questions, this question: "Did the agent ever ask you to return the PPSh parts kit?" And then you'd find this underlined, which means the government contends—and, of course, the [129] defendant contends otherwise, that the answer, "No, sir. She asked me to surrender the RPK kit."

That's one of the sections. The other section is, the question is, "Sir, did you have any discussion with the agent about the PPSh parts kit?" And the answer, and this is underlined, which means there's a contention that it is perjurious, "None at all."

Those are the sections which the government contends under Section 1623(a) is—comes within that statute.

In order for the government to prove the case in each of Counts One and Three, it must prove several elements beyond a reasonable doubt.

First, that the defendant actually gave the testimony under oath before the federal grand jury.

Secondly, that the defendant testified as detailed in Counts One and Three.

Thirdly, that the testimony identified by the underlining that I just mentioned was false when he gave that testimony.

And fifth, that the false statement was material.

A statement is material if it has a natural tendency to influence or is capable of influencing a decision. However, statements can still be material even if it does not actually deceive. And, ladies and gentlemen, a [130] defendant must give that statement knowingly that it is an untruth.

Now, in Count Three, the only addition to what you have to look for in Count Three and over and above Count One, is that there are two different contentions about false statements in Count Three.

So in Count Three it alleges that the defendant knowingly made two false statements under oath. In order for you to convict, the government is not required to prove, and you need not find, that each of those statements was, in fact, false. But the government must prove beyond a reasonable doubt to each of you that at least one of the specified statements alleged in Count Three was false.

It is not sufficient for some members of the jury to agree that one of the statements is false, while others of the jury agree that the other statement is false. There must be at least one specific statement that each of you agrees is false, and that each of you agrees that the defendant knew was false.

The government is required to prove beyond a reasonable doubt, and you must unanimously find in other words, that at least one of the statements contained in Count Three was false and that the defendant knew that that statement was false.

Now, in Counts Two and Four it is alleged [131] essentially the same kind of thing, because they arise under Title 18 U. S. Code, Section 1001.

Count Two charges at the time, the same date, October 27th 2003, in a matter which was before the judicial branch or the legislative or executive branch of the government, the

defendant knowingly and willfully made a materially false, fictitious and fraudulent statement.

And Count Four charges the same thing. They are parallel counts to Count One and Three. But in Counts Two and Four he's charged, as I said, with violating Section 1001, Title 18. That section of the law provides that whoever in any matter within the jurisdiction of the executive, legislative or judicial branch of the government of the United States, knowingly and willfully makes any materially false, fictitious or fraudulent statement or representation, shall be guilty of an offense against the United States.

The elements which the government must prove beyond a reasonable doubt as to each of those two counts is that, first, the defendant knowingly made a false, fictitious or fraudulent statement as alleged in the indictment in Count Two or Four.

And secondly, that in making the false, fictitious or fraudulent statement, the defendant acted willfully.

Thirdly, that the statement was made in a matter [132] within the jurisdiction of the executive, legislative or judicial branch of the government.

A statement is false or fictitious if it was untrue when it was made and then known to be untrue by the person making or causing it to be made.

A statement is fraudulent if it is known to be untrue or caused to be made with intent to deceive.

A statement is material—I'll give you the same instruction on material that I gave you on Counts One and Three—if it has a natural tendency to influence or is capable of influencing a decision. However, a statement can still be material even if it does not actually deceive.

Count Five of the indictment alleges on the same day, October 27th, 2003, that the defendant, Mr. Rita, corruptly influenced, obstructed, impeded and endeavored to influence,

obstruct and impede the due administration of justice by causing false and misleading information to be given to the grand jury. That's a violation of Title 18, U. S. Code, Section 1503. And that that section of the law provides whoever corruptly influences, obstructs, impedes or endeavors to influence, obstruct or impede the due administration of justice shall be guilty of an offense against the United States.

In order for the government to prove its case it must do so beyond a reasonable doubt and it must prove each [133] of the following:

One, that the grand jury proceedings identified in the indictment was pending at the time of the alleged indictment.

Secondly, that the defendant knew that the grand jury proceeding was pending.

Thirdly, that the defendant provided false and misleading information to the grand jury as alleged in the indictment.

And fourthly, that in doing so the defendant corruptly endeavored to influence, obstruct or impede the due administration of justice.

To act corruptly, as that word is used in these instructions, means to act voluntarily and deliberately and for the purpose of improperly influencing and obstructing or interfering with the administration of justice.

The term "endeavors" as that term is used in these instructions means to knowingly deliberately act or to knowingly and deliberately make any effort which has the reasonable tendency to bring about the desired results. It is not necessary for the government to prove that the endeavor was successful or, in fact, achieved the desired results.

Now, in Count Five of the indictment it's alleged the defendant made several false statements under oath. In [134] order for you to convict, the government is not required to prove to you that all of the statements alleged in Count Five

are false. The government, however, must prove beyond a reasonable doubt to each of you that at least one of the specific statements alleged in Count Five was false.

It is not sufficient that some member of the jury agree, as I've said in Count Three—it's not sufficient that some agree that one thing is false and others agree that another thing is false. There must be at least one specific statement that each of you agree was false, and that each of you agrees that the defendant knew that it was false.

The government is required to prove the guilt beyond a reasonable doubt, and you must unanimously find, in other words, that at least one of the statements alleged in Count Five was false and that the defendant knew that the statement was false.

I've charged you several terms that need a little more definition. One is "on or about a certain day", and you'll note that the indictment charges on or about certain dates.

The proof need not establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in the case establishes beyond a reasonable doubt the events or offense that was committed took place on a [135] date reasonably near the date alleged.

I've used the term "knowingly" in these instructions. And that word, as it's been used in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or accident.

I've also used the term "willfully" in these instructions. That means that the act was committed voluntarily and purposely. That is, with specific intent to do something which the law forbids. That is to say, with bad purpose to either disobey or to disregard the law.

Now, ladies and gentlemen, as I've mentioned to you, there are five separate counts and you must consider each of the five separately.

The number of charges against the defendant is not evidence of guilt and your decision on any one charge, whether it's guilty or not guilty, should not influence your decision on any other charges. Each offense and the evidence pertaining to it should be considered separately. The fact that you may find the accused guilty or not guilty of one of the offenses charged should not control your verdict as to any of the other offenses.

I caution you, members of the jury, that you're here to determine the guilt or innocence of the accused from the evidence in this case. The defendant is not on trial for any act or conduct or offense not alleged in the [136] indictment. Neither are you called upon to return a verdict as to the guilt or innocence of any other party or persons not on trial as a defendant here today.

Also, the punishment which is provided by law for the offenses alleged in these charges is a matter exclusively within the province of the Court, that is, the judge makes the determination of the sentence, and it should never, ever be considered by you, the jury, in arriving at the verdict in the case. And you must arrive at an impartial verdict in the case without any regard to what sentence may or may not come.

Now, I charge you, ladies and gentlemen, that any verdict you may reach in the jury room, whether it's guilty or not guilty, must be unanimous. In other words, to reach a verdict you must all agree.

Your deliberations will be in secret and you'll never have to explain your verdict to anyone. It's your duty as jurors to discuss the case with one another in an effort to reach agreement, if you can do so. Each of you must decide the case for yourself, but only after full consideration of what each of your fellow jurors has to say.

While you're discussing the case, do not hesitate to change your mind if you become convinced that you were wrong. But

never ever give up your honest belief solely because others may think differently or merely to get the [137] case over with. Remember, ladies and gentlemen, that in a very real way, you're the judges, judges of the facts. Your only interest here is to seek the truth from the evidence in this case.

Upon retiring to your jury room you should first select one of your members to be your foreperson. Your foreperson will preside over your deliberation and be your spokesperson here in court.

There's a verdict form which you will have with you and you can't see it from where you sit, but it is a two-page document and it is appropriately entitled, "Verdict," and it reads as follows, and you'll proceed as follows: "We the jury in the above-styled case, do find the defendant, Victor A. Rita, guilty or not guilty," and your foreperson will fill in whichever your unanimous verdict may be, of the crime charged in Count One in the indictment.

And then you'll move to the second. "We, the jury in the above-styled case, do find the defendant, Victor A. Rita, Jr. guilty or not guilty," whatever your unanimous verdict will be, your foreperson will fill it in. You'll go through each of five numbers here because there are five counts, and you will fill in either guilty or not guilty, whatever your unanimous verdict may be.

When those five blanks are filled in, your foreperson will then sign it and date it, and you'll be [138] ready to return to the courtroom to deliver your verdict.

Now, with you in the jury room, ladies and gentlemen, you will have the exhibits which have been introduced into evidence here. You'll also have a copy of the indictment, which I have here in my hand. You will have the verdict form, which I have here in my hand. And you will also have a copy of the instructions, which I have just given to you this morning.

If there should come a time that you need to talk with the Court or ask a question of the Court, have your foreperson write that comment or question down on a piece of paper and sign it. It will then be delivered to me and I'll either get back to you in writing or I'll call you back in here to discuss whatever it is you want to discuss.

If the latter happens and you come back in here and we discuss it, never ever at any time reveal to me or anyone else what your numerical division may be at that time. That's not for me to consider and that's not for anybody else to hear. Your discussions and where you stand are up to you, not up to me.

Now, ladies and gentlemen, it is now a quarter of ten. I probably will check on you around 11 o'clock to see if you want to take a break.

I'm not in any way indicating how long you should deliberate. That's your business, not mine, nor anyone [139] else's. That's your sole and separate business. But we'll check to see if you want a break and if you want one, we'll let you go for that break. But do not—let's not have part of you deliberate while some are out of the room. Everybody is entitled to participate in all of the deliberations that take place.

What we'll do is if you want a break, Mrs. Hankins will come back, as you take a break, and then you will not begin your deliberations again until Mrs. Hankins comes back in and counts you. We have to do that for the record. So please be guided by that.

Now, if you need a break before 11 o'clock, all you've got to do is let me know. We're here to serve you and all you've got to do is let us know.

Now, looking over the jury completely it looks to me like—it looks to me like everybody is ready to deliberate this matter, and that means that, Mrs. Rankin and Wofford, our jurors No. 13 and 14.

The Constitution of the United States will not allow 14 people to deliberate on a case, and so we can only have 12. I'm sure that you would agree Mrs. Rankin and Mrs. Wofford both would be excellent jurors and you'd like to have their services with you, but we can't do that. Of course, they've served well, but if any of you had had an emergency or sickness, they would have stepped in and been [140] one of the original 12.

So Ms. Rankin and Mrs. Wofford, do you have anything in the jury room?

JUROR RANKIN: I don't.

JUROR WOFFORD: No, Your Honor.

THE COURT: I'm going to ask you to step down right beside the door there for a minute, if you will. You'll be shown where to stand there and I'll tell you why in a minute.

Ladies and gentlemen, we have found over the years that jurors sometimes become good friends immediately and sometimes lasting friends, so before you have to leave Mrs. Wofford and Mrs. Rankin, I want to give you an opportunity to say goodbye to them. Now, you don't have to say goodbye, you can ignore them if you want to, that's your privilege. But they are standing there so they'll have an opportunity to say goodbye to you as you go to your deliberations. They are going to be free to go or stay as they choose to do, but they will not be participating in your deliberations.

Thank you, ladies and gentlemen. You may go.

(Jury leaves courtroom at 9:49 a.m.)

THE COURT: Anybody—wait just a minute. If you all will have a seat there just a minute, please.

Anybody have any objection or additions to the [141] instructions as given? Mr. Martens?

MR. MARTENS: No, Your Honor.

THE COURT: And Mr. Forrester?

MR. FORRESTER: None, Your Honor.

THE COURT: Thank you. You may take a copy of this then with you. Here you are.

MR. MARTENS: Do you want the exhibits to go back right now?

THE COURT: Yes.

MR. MARTENS: I assume we're not sending the gun back.

THE COURT: No. Does it have the locks on it?

AGENT SCHROEPFER: It's nonfunctional, Your Honor. It's been disassembled completely and tie-strapped.

THE COURT: Since I did not mention that, it will go back to the jury. I won't bring them back to tell them, I'll just send it back. So that will go back in the jury room.

AGENT SCHROEPFER: It will, Your Honor.

THE COURT: All right. If you all will all be around the building somewhere, but before everybody gets out, does anybody have any objection if I send Ms. Hankins back about 11 o'clock to inquire if they do want to take a break, and if they do want to take a break then she will go back in and count them before they begin deliberations and [142] she will tell them if they are taking a break, they are not to deliberate until all 12 of them are there and have been counted. Anybody have any objection to just doing it that way?

MR. FORRESTER: No objection.

MR. MARTENS: No objection.

(End of testimony and instructions.)

* * * *

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

[Filed JUN 3, 2005]

DOCKET NO 3:04CR105

UNITED STATES OF AMERICA,

vs.

VICTOR A. RITA, JR.

Defendant.

MOTION FOR DOWNWARD DEPARTURE

FACTS AND PROCEEDINGS

The Defendant, Victor A. Rita, Jr., was found guilty after a trial on November 8, 2004, to Count One through Count Five of a criminal indictment charging him with violations of Title 18 U.S.C. §§1001, 1503 and 1623; Making False Statements, Obstruction of Justice and, Fraudulent Statement before a Grand Jury.

This case is ancillary to the investigation of Inter Ordnance of America, LP (IO) a North Carolina company which was indicted for violating Title 18 U.S.C. Section 922(o); Illegal Importation of Firearms. Mr. Victor Rita, Jr., (Mr. Rita) is a residence of the State of Florida. He ordered two different firearms "parts kits" from (IO) in January 2003.

Mr. Rita served in the Vietnam Era Conflict and in Operation Desert Storm. In the United States he assisted governmental agencies with weapons training for law enforcement officers. His interest in model firearms used in wars, led to his collection of model firearm "parts kits". Within a 30-day period beginning on or about January 9,

2003, Mr. Rita ordered two different "parts kits" from IO. He purchased a PPSH-41 "parts kit" and then a RPK "parts kit". The impetus to purchase these "parts kits" by this gun enthusiast was the advertisement of IO. The items were advertised as "parts kits" as opposed to firearms. "Parts kits" or "dummy guns" have inoperable receiver. The receiver houses the firing mechanism for assault weapons.

On or about September 4, 2004, Mr. Rita contacted Special Agent Bonnie Levin of the Bureau of Alcohol, Tobacco, Firearms & Explosives-Miami Group I (ATF); after hearing an old telephone message. The time was approximately eight months after the relevant purchases from I0. The agent called concerning the abandonment of a "parts kit" Mr. Rita had purchased in January 2004. Mr. Rita's understanding was that the agent wanted the last "parts kit" he had ordered; the RPK model. The agent's actions with the defendant's former attorney, Neil G. Taylor, Esq., would support the premise that there was confusion and negligence. The agent called Mr. Taylor's office to confirm transfer of the "parts kit" before visiting his office to retrieve it.

Due to Mr. Rita's job assignment on a U.S. Coast Guard Cutter in Key West, FL and other engagements; he arranged for the transfer of the kit to the Government via his former attorney, Neil G. Taylor of Miami, Florida. Mr. Rita relinquished possession and control of the RPK parts kit, to Attorney Taylor on or about September 9, 2003. The attorney and the ATF agent, who is also a law school graduate, made arrangements for the delivery of the "parts kit" to the ATF. Apparently neither professional; attorney or agent confirmed which particular "parts kit" was to be delivered. Again the chain of events demonstrates the lack of diligence by the case agent. Written confirmation was not sent to Mr. Rita, as was directed by the ATF; and again no written confirmation to Mr. Taylor before the delivery date and time. It was in the meeting at Mr. Taylor's office after discussing their other

mutual acquaintances that the agent told Attorney Taylor that she believes he has the wrong "parts kit". This happened after she examined the contents of the box it was in.

When questioned concerning the relinquishment of the "parts kit" his answers and actions were inconsistent with expected behavior by the Department of Justice. On October 27, 2003, as part of the investigation concerning IO, Mr. Rita was subpoenaed to testify before a grand jury in Charlotte, NC. At the proceeding Mr. Rita gave answers contrary to his literal actions. Though technically inaccurate, Mr. Rita still believes the contextual sincerity of his answers was and is responsive to the questions posed. The government believes and proved otherwise at trial.

Mr. Rita voluntarily retired from the Department of Homeland Security-Immigration and Naturalization Services. Though 17 years ago he left after being convicted of a firearm related offense; he was rehired by the same governmental agency until his retirement in 2003.

Mr. Rita's service to our nation includes employment with: the military; Department of Homeland Security and; the Untied States Coast Guard. During this time, while raising a family, Mr. Rita completed an Associate of Arts Degree.

Mr. Rita is the co-parent of two boys. One is a teenager and the other is a 25 year old college student. Both are mutual children of him and his wife. Along with his wife; Mr. Rita supports the boys, financially and otherwise. Mr. Rita was decorated with more than 35 military awards or medal. His retirement plans are to spend more time with his sons and work to help defray the college cost of his older son. Due to severe sickness from: Type II Diabetes Mellitus; an enlarged prostate; infections on his legs and neck; skins rashes and infections fro [sic] exposure to Agent Orange; a herniated disk in his lower back; hyperlipidaemia; arthritis and; sleep apnea, every day is an endurance test. He continues to visit

his doctors and takes numerous medications to treat the symptoms.

Currently, Victor A. Rita, Jr., works at Miami Jewish Homes as a dispatcher for their transportation department. His goals are to see his sons graduate from college and enjoy his golden years in serenity with his wife of over 25 years.

Mr. Rita is presently scheduled for sentencing on June 7, 2005. Based on the advisory United States Sentencing Guidelines (U.S.S.G.) Chapter 5, Part A, he has a total offense level of 20 and a criminal history category of I the guideline range for imprisonment is 33 to 41 months for being found guilty of the aforementioned violations. Mr. Rita submits the following for the Court's consideration in determining an appropriate sentence below the guideline range.

In the recent unpublished decision in *United States of America V. Joyce Lee Higdon*, No 99-4837 (4th Cir. 2001), the Fourth Circuit reiterated its requirement that a motion for downward departure be subjected to the three-part analysis developed in *United States v. Brock*, 108 F.3d 31, 33-4 (4th Cir. 1997), and *Koon v. United States*, 518 U.S. 81, 95 (1996). Upon identifying distinguishing features, the court must next ask a series of questions to determine whether it should depart: Has a factor been forbidden by the Commission and is it thus a potential basis for departure? In order to determine whether the factor actually may support a departure, the court must ascertain into which of the following categories the factor falls: (I) a factor encouraged by the Commission as a basis for departure and is it either (a) taken into account in the applicable guideline itself or (b) not taken into account in the guideline; (2) a discouraged factor by the Commission as a basis for departure; or (3) a factor unmentioned by the Sentencing Commission.

I

DEPARTURE BASED ON EXTRAORDINARY PHYSICAL IMPAIRMENT

Defendant's conditions are such that it could be termed as an "extraordinary physical impairment."

Mentioned Factor

It was the District Court's duty . . . to assess Johnson's condition at the time of sentencing," *United States v. Woody*, 55 F.3d 1257 (7th Cir. 1995). Gleaned from the presentence report we see that Mr. Rita suffers from multiple health issues. The combinations of sicknesses are taxing on his physical structure and his mental spirit.

The defendant suffers from high blood pressure and has little use of his back due to degenerative disk disease. The services at a non-medical Federal penitentiary are inadequate to accommodate his illnesses. Expectedly Mr. Rita is sullen concerning his future.

DOWNWARD DEPARTURE IS APPROPRIATE IN THE INSTANT CASE.

Infirmity

An extraordinary physical impairment may warrant departure under U.S.S.G. § 5H1.4 which allows non-custodial sentence for a seriously infirm defendant. The courts have upheld a downward departure where the defendant suffered from chronic obstructive pulmonary disease and the debilitating effects of cancer. *Untied States v. Ghannam*, 899 F.2d 327 (4th Cir. 1990). Mental retardation, scoliosis of spine and chronic pain may warrant departure under § 5H1.4 pursuant to *United States v. Slater*, 971 F.2d 626, 635 (10th Cir. 1992).

In this case defendant contends that his health has deteriorated since 2003. His physical decline is partially from the mental agony of defending an indictment 700 miles away

from his home. The evidence suggests that his health will continue to wane until life expires if he was to remain incarcerated for a long time. It is general belief that defendant will receive better care in a private facility than in an institution designed for punishment; not rehabilitation of the sick and injured. Living with his conditions means that Mr. Rita is more susceptible to infections a healthy person's body would repel and or recover from. *United States v. Johnson*, 71 F.3d 539, 545 (6th Cir. 1995) (under U.S.S.G. § 5H1.4, although "rare," downward departure [is] possible for a physician convicted of distribution of drugs and mail fraud based on his medical conditions where defendant was a 65-year-old man who suffered from diabetes, hypertension, hypothyroidism, ulcers, potassium loss, and reactive depression. However, specific findings required. Part C of the Presentence Report enumerates the many documented ailments of Mr. Rita.

A Combination of serious health problems is sufficient to allow departure.

"Combination of serious health problems requiring on-going monitoring plus prior" "charitable and civic good deeds" are sufficient to allow departure to level allowing home confinement, probation and community service." *United States v. Greenwood*, 928 F.2d 645, 646 (4th Cir. 1991). In *Greenwoood*, the defendant's time in the armed services was esteemed highly. Mr. Greenwood, loss both of his legs in war which required ongoing treatment. Mr. Rita served his country in two wars. In the Vietnam Era Conflict he contracted Agent Orange and is designated as disabled as a direct result of it exposure. He also served in Desert Storm. Mr. Rita has rendered a valuable service to the federal government.

Vulnerability To victimization In Prison.

Vulnerability to victimization in prison may be ground for departure. *United States v. Maddox*, 48 F.3d 791, 797-98 (4th

Cir. 1995). *Koon v. United States*, 518 U.S. 81, 116 S.Ct. 2035 (1996). Case law states the sentencing court "in extraordinary and limited circumstances, vulnerability to victimization may be an appropriate consideration for discretionary departure." *United States v. Belt*, 89 F.3d 710, 714 (l0th Cir. 1996) (citing *Koon v. United States*, 518 U.S. 81, 116 S.Ct. 2035 (1996). In the present case defendant has met the *Koon* criteria for vulnerability. *United States v. Volpe*, 78 F. Supp.2d 76, 89 (E.D.N.Y. 199 [sic]) ("Volpell") Defendant entitled to two-level departure because `"the extraordinary notoriety of this case coupled with this status as a police officer," left him "unusually susceptible to abuse in prison" and defendant may have to spend most of his time in segregation; *United States v. Bruder*, 103 F.Supp.2d 155, 182 (E.D.N.Y. 2000). Therefore granting of this motion would be appropriate.

Mr. Rita has demonstrated an industrious character which will stand him in good stead as he maintains his efforts at mental and physical rehabilitation. He is a veteran, husband and, father with strong convictions which leads him. He has had other run-ins with authorities yet his loyalty to his country has never wavered. Mr. Rita understands he has constitutional right to have ideological difference with the executive branch of our system. This remarkable fact is an extraordinary quality in Mr. Rita's life.

II

MILITARY SERVICE

Mentioned Factor

"Military, civic, charitable . . . . and similar prior good work are not ordinarily relevant to departures. Nevertheless, courts may downward depart for extraordinary military service". *United States v. Pipich*, 688 F. Supp. 191 (D.Md. 1988), (where defendant convicted of mail theft extraordinary military record warrants departure to probation [sic]. Defen-

dant was in Marines from 1968 and served in combat in Vietnam for one year. He received over 45 awards of the Air Medal, including one special award for heroism in connection with the extraction of a reconnaissance team. Departure for military service might be warranted under some circumstances *United States v. Neil*, 903 F. 2d 564, 566 (8th Cir. 1990).

CONCLUSION

The combination of efforts discussed herein takes this case out of the heartland of typical cases and justifies a significant downward departure. Most defendants do not come to sentencing with the wealth of lifetime achievement and service to their country as Mr. Rita. His sacrifice to country will continue because as a former federal officer he most probable will be ostracize and victimize at any institution.

Rita requests that the Court consider these factors in departing downwardly from his guideline sentencing range.

Respectfully submitted

This: the 2nd day of June 2005.

/s/ Denzil H. Forrester
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UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

CASE NO. 3:04-Cr-00105-1

UNITED STATES OF AMERICA,
Plaintiff,

v.

VICTOR A. RITA, JR.,
Defendant.

The above entitled cause came on for sentencing hearing before the Honorable William L. Osteen, Judge of the above-styled court, at his chambers in the courthouse, Charles R. Jonas Federal Building, 401 West Trade Street, Charlotte, North Carolina, on Tuesday, June 7, 2005.

APPEARANCES

For the Plaintiff:	MATTHEW T. MARTENS, Assistant United States Attorney United States Attorney's Office Carillon Building, Suite 1700 227 West Trade Street Charlotte, North Carolina 28202 Telephone: (704) 344-6222
For the Defendant:	DENZIL H. FORRESTER, Esq. Post Office Box 32511 Charlotte, North Carolina 28232 Telephone: (704) 632-9992
US Probation Officer:	KYMM KAY, US Probation Officer North Carolina Western Probation Office 200 South College Street Room 1650 Charlotte, North Carolina 28202 Telephone: (704) 350-7610

[3] PROCEEDINGS

THE COURT: What are we calling here?

MR. MARTENS: This is 3:04-cr-105, United States versus Victor A. Rita, Jr.

Matthew Martens for the United States.

THE COURT: All right. Thank you very much, Mr. Martens.

Mr. Forrester, are you and your client ready to proceed here today?

MR. FORRESTER: Yes, sir, your Honor.

THE COURT: All right. There were—let's see. You had something under objections.

Other than the motion for downward departure that you submitted, do you have any other objections? And what I'm trying to do now is to determine where your client fits within the sentencing guidelines.

Do you have any objections to the pre-sentence report prepared by Ms. Kay as they affect sentencing guidelines, Mr. Forrester?

MR. FORRESTER: As they affect sentencing guidelines, no, sir, your Honor, because she issued—Ms. Kay issued a revised pre-sentence report on the 25th of May.

THE COURT: Right.

[4] MR. FORRESTER: Which addressed and clarified some of the objections, your Honor.

THE COURT: So you're in accord with the May 25 revised pre-sentence report?

MR. FORRESTER: As far as they don't affect his—well, certain things were not necessarily addressed, but those would fall under the offense characteristics, your Honor, but as far as them affecting the sentencing guidelines, no.

THE COURT: All right. Well, let me put it in another way. Is there anything that you have that you want to bring to the Court's attention that you think should be changed about the actual sentencing guidelines found by Ms. Kay?

MR. FORRESTER: No, your Honor.

THE COURT: All right. And, Mr. Martens, I take it you don't either?

MR. MARTENS: Well, I just actually as I was reviewing it again this afternoon I recognized what I believe is probably a typographical error—

THE COURT: All right.

MR. MARTENS: —in paragraph 43. [5] Paragraph 46 it makes a reference to an offense level of 24, but up above it refers to a level of 20.

THE COURT: Okay.

MR. MARTENS: And at the end it uses a level 20. So I think those should be corrected.

THE COURT: Do you agree with that, Ms. Kay?

PROBATION OFFICER KAY: Yes, sir.

THE COURT: All right. Thank you for catching that, Mr. Martens.

Under the ordinary sentencing guidelines, Mr. Forrester, you would agree then that your client is an offense level of 20, a criminal history category of 1, which means under the guidelines ordinarily your client would be facing 33 to 41 months of imprisonment, at least two years but not more than three years of supervised release, up to $75,000 in fine, and a special assessment of $500.

Do you agree with that?

MR. FORRESTER: I do agree, your Honor.

THE COURT: All right. Do you have any evidence that you want to present on an [6] appropriate sentence?

MR. FORRESTER: I do, your Honor.

THE COURT: You may present your evidence.

MR. FORRESTER: I submitted a motion for downward departure, your Honor.

THE COURT: Yes, sir.

MR. FORRESTER: Based on physical impairment. I think they are listed--well, all of them or most of them are listed in the pre-sentence report. I'll just jot over some of them right now.

Based on hypertension, degenerative disc disease, Type 2 diabetes, enlarged prostate, infection in his legs, skin rash due to exposure to Agent Orange while he was a foot soldier in Vietnam, arthritis, sleep apnea, and different respiratory ailments.

The third problem—the second problem rather would be vulnerability to victimization and also just different pressures while in prison.

THE COURT: Now, do you have any evidence that you want to present on that?

MR. FORRESTER: I believe we've—[7] Ms. Kay has some information concerning what Mr. Rita sent to her, and also I will proffer the sentencing recommendation that we don't have a copy of, but I believe your Honor and the U.S. Probation Office is privy to that.

Am I correct?

PROBATION OFFICER KAY: I'm sorry?

MR. FORRESTER: The sentencing recommendation table talks about how he's been threatened, his life has been threatened because he's testified on several occasions.

PROBATION OFFICER KAY: Your Honor, the sentencing recommendation section, I just have information that he

has testified in numerous criminal cases in the justification paragraph at the end, and I think that's what he's referring to.

The defense counsel and the U.S. Attorney, they don't get copies of that recommendation.

THE COURT: They don't get copies. Well, we do in our district, so I assume that everybody gets copies of that.

PROBATION OFFICER KAY: Right. Yes, sir.

THE COURT: All right.

[8] PROBATION OFFICER KAY: And the other thing that I think Mr. Forrester is speaking of is Mr. Rita had provided me copies of business cards of different agencies that he's worked for and testified against to include like the Border Patrol and also a subpoena where he was called to testify.

I think the last time he was called to testify was January '04, and this is a copy of the subpoena for that.

THE COURT: Well, that's a listing that was given to Ms. Kay by your client.

PROBATION OFFICER KAY: That's correct.

THE COURT: Now that does not constitute evidence.

Are you going to put on evidence to show that he should be getting a downward departure, or under 3553, your client would be entitled to a different sentence than he should get under sentencing guidelines, Mr. Forester?

MR. FORRESTER: I could call my client to the stand, your Honor.

Under the—well, I was under the understanding that at sentencing the evidentiary rules are somewhat lax.

[9] THE COURT: They are.

MR. FORRESTER: To where different matters, hearsay, I think proffered by the U.S. Probation Office and also by the

defendant would be seen and it would be gleaned upon in rendering a sentence by the Court.

THE COURT: But here's the problem with that: There are two ways to get a downward departure. One is by a 5K1 being filed by the Government, and ordinarily, the Government simply sets forth in the document itself what the defendant has done and sometimes they make a recommendation, once in a while they do not, as to how much time it should be reduced.

Now, if we don't follow that procedure, then I think under 3553 you would have a right to show why your client should be considered for a sentence of less than he would get under the guidelines because of his unusual cooperation. But a statement by a defendant I cooperated with DEA when they were investigating Sam Smith doesn't really tell me anything.

If I'm going to find out what he did or why his testimony or help was unique, I've got [10] to have some way of making that determination.

MR. FORRESTER: Okay.

THE COURT: Do you see what I'm trying to say?

MR. FORRESTER: I see what you're trying to say, your Honor. As a matter of fact, you've said it and I've comprehended it. However, I would like to say we're not moving for a downward departure based on any sort of cooperation with the Government. It's based—based in law under U.S. Sentencing Guideline I think Chapter 5H1.4.

THE COURT: Yes. All right.

MR. FORRESTER: When it concerns his physical condition, and I'll come back to that.

However, concerning vulnerability, the victimization in prison that we're actually going on with standing case law, your Honor, in brief cited U.S. versus Ghannam, which is a Fourth Circuit case.

It spoke about—well, that's more going towards physical condition where it talks about scoliosis of the spine and chronic pain, and in that the Court felt downward departure was warranted.

[11] In another case it talks about hypertension in someone of being 65 years old.

I will say that Mr. Rita is an advanced age—

THE COURT: Wait a minute.

MR. FORRESTER: Go ahead.

THE COURT: What's an advanced age?

MR. FORRESTER: Advanced age, your Honor.

THE COURT: Of what?

MR. FORRESTER: Let me grab —57. Anything over 55. Let me grab my notes from my—I did a bit of research on this, and if I could proffer it to you.

THE COURT: Well, you're not going to proffer me evidence that shows that everybody over 57 is advanced age. Now, if you get up into the 80s I might agree with you, but short of that, I'm a little bit skittish about finding that everybody is at an advanced age.

MR. FORRESTER: And please don't be skittish on my word. These are from basically Social Security published, your Honor. So I just want to show you.

THE COURT: Mr. Forrester, I don't believe we're on the same wavelength here [12] today.

MR. FORRESTER: I'm just saying that based on Federal Law, it reads individuals approaching advanced age 50 through 54.

THE COURT: What?

MR. FORRESTER: And it talks about significant limited vocation adaptability, but that's more as far as someone who's illiterate.

But basically advanced age as far as Social Security guidelines are concerned, and I know this is not a Social Security case, but still it is Federal Law.

THE COURT: But it's not—Federal Law—that may be true. I'm not exactly sure.

By the way, I was kidding with you about that.

MR. FORRESTER: I proffer you that. That's where I'm getting it from. I say nothing based on my own whim.

THE COURT: Well, what do you want me to take from the fact that Social Security says somebody who is 57 years-old does not have the same range of possible employment than someone who is under 57 might have?

What are you asking me to take from that?

[13] MR. FORRESTER: Take from that the vulnerability where Social Security might use that as a determination as far as someone's ability to adapt to different work conditions meaning that they can no longer dig a ditch.

If they're technically advanced age, then take from that my client, though, he's not in his 20s or 30s or in his 40s, he might not be able to be as competitive in the highly adversarial world of prison wall.

That's what I want you to take from that.

THE COURT: Well, I'm not sure how much I'm taking from that, but I must say this also: That if your client or anyone else contends that I can't do some kind of work, generally that's supported by some medical evidence that says I examined this man regularly, and I know that he can't pick up five pounds without running an injury to his back or something like that.

MR. FORRESTER: Well, I've proffered a list of paraphernalia that Mr. —I think you have downstairs, right?

THE DEFENDANT: Yes.

MR. FORRESTER: He was stopped by the [14] U.S. Marshals. Those are the medicines, those are the different instrumentality that he needs to maintain life as he knows it on a daily basis.

I know Ms. Kay—my client has submitted directly to the U.S. Probation Office a list of ailments, a list of medications.

If I can—

THE COURT: How many of these are—

MR. FORRESTER: Can I—

THE COURT: How many of these are medically prescribed?

MR. FORRESTER: All of them, your Honor.

THE COURT: Such as Vitamin E?

MR. FORRESTER: Vitamin E medically?

THE DEFENDANT: Yes. I have a copy of my medical records. That's all there described.

MR. FORRESTER: Can I proffer copies of his medical records? They're all here, your Honor.

THE COURT: Have you shown them to Mr. Martens?

MR. MARTENS: I'm fine.

MR. FORRESTER: He's waived.

THE COURT: All right. You may send them [15] up.

MR. FORRESTER: Okay.

THE COURT: What are we doing over here, Mr. Forester?

MR. FORRESTER: Sorry. You're reviewing. But there are more medicals and different records that weren't proffered. If I can submit some more.

THE COURT: All right. Well, let's see. Maybe we can take the easiest thing first.

You have submitted to Ms. Kay—this is from Mr. Rita—subject: Safety concerns.

I am enclosing a partial list of names and departments of individuals that I've provided information to or I have worked in conjunction with on various immigrations or other criminal investigations. If needed, you may contact them for verification. Some will know me by my proper name. Some will know me by another name, and others will know me as another name. If needed, I can provide additional names and departments.

Now there are names of people here whom I don't happen to know personally, but they're coast guard people, they're FBI agents, perhaps [16] some other organizations, City of Key West, Florida.

I don't have any idea what to make of that. Was that helpful information to him, or was it information that led to the discovery of seven terrorists, or was it simply you all ought to clean your ships or—I don't have any way to evaluate that.

How can I evaluate that?

MR. FORRESTER: Well, one way we can, your Honor, not necessarily that information because that was not sent to me, it was sent to Ms. Kay directly. I'm just—first time I'm finding out about that.

However, there is a subpoena from back in February of 2004. So I think that should be indicative of whether the quality of the testimony or the need to have Mr. Rita testify.

THE COURT: A subpoena for what?

MR. FORRESTER: They subpoenaed him as a witness to testify at trial. It's—I believe I proffered it to the Court in the materials up there.

THE COURT: Well, am I correct that nothing here would indicate anything of [17] particular consequence for me to review?

MR. FORRESTER: You are correct.

THE COURT: Okay.

And here is a department—here's a Department of Homeland Security saying we accept your voluntary retirement application, and it simply says how you keep health insurance and how you get your thrift savings package out.

What am I to make of that three-page letter?

MR. FORRESTER: Well, we could skip over that because in the pre-sentence report we understand he's retired. I believe that diminishes the value of that right now, but if—go ahead.

THE COURT: Here is a document that says my health and medical problems really started in Vietnam and were aggravated during Desert Storm. I requested copies of my medical records from Miami Veterans Affair Hospital to present. By doing it this way, you will have past and current information you requested.

I don't know what that's for, but what does that tell me?

[18] MR. FORRESTER: I'll say it again. Some of these documents it's the first time that I'm reviewing them. Actually, I'm not even reviewing them because I'm just getting them from Ms. Kay and passing them on to your Honor.

However, I will say this: It's a—I know that he has gotten disability in part of that because of his exposure to Agent Orange.

THE COURT: Okay.

MR. FORRESTER: Go on.

THE COURT: Give me some—we'll get to that about Agent Orange in a minute, but what you're doing is asking me to read these things that you haven't read.

Here is a net worth statement short form instruction. Please complete the net worth form statement in its entirety, and it's a one-page document.

I don't know what to make of that.

MR. FORRESTER: Not deflecting anything back to Ms. Kay, my client in Court maybe four minutes ago said he—when she first handed me a stack of medical records, he said there should be more than that, and I went over there to check on more than that, and I asked and see [19] more medical records and those are what I was handed.

I think—

PROBATION OFFICER KAY: Excuse me.

THE COURT: Here's a statement the declaration—

PROBATION OFFICER KAY: Excuse me. Those are what you took.

MR. FORRESTER: Okay. Those are what I took.

PROBATION OFFICER KAY: I didn't know what he wanted. He just said give me everything and he just grabbed what was in my file.

THE COURT: Well, you better screen these things so I'll know what to look at. I don't make any sense out of the first four, five documents that I've looked at. I have no idea what they say or mean of relevance here.

So what are we going to do here?

MR. FORRESTER: Well, if they don't provide evidence concerning disability, your Honor—

THE COURT: They do?

MR. FORRESTER: Come again?

[20] COURT: They do?

MR. FORRESTER: I said if they don't.

THE COURT: Well, I want you—you're the one who's presenting these, so you better look at these documents and tell me what if anything these documents show.

Somehow or another we need to get those to Mr. Forrester.

Here is a non-negotiable check for $571.90 made payable to Victor Rita.

Here's a subpoena—and this must be what you're talking about—a subpoena in a criminal case. You should report on Monday, February 23rd in the above-mentioned case, which is United States versus Juan Rivera.

What does that mean to us, Mr. Forester, that he was subpoenaed?

MR. FORRESTER: What it means—well, what it should mean to us, your Honor, is that in a criminal case when someone is subpoenaed, basically prosecution wants him there because they feel they're going to give value to the testimony and value to the evidence.

What that means, and reflecting back to my motion for downward departure, is that as my [21] client has said and I have said, he's testified in numerous criminal and immigration matters to where he has been threatened.

THE COURT: But this was a subpoena issued by a private attorney. This is not the U.S. Government issuing the subpoena. It's Benjamin Daniel.

THE DEFENDANT: He's a U.S. Attorney.

MR. FORRESTER: My client just whispered that he is a U.S. Attorney, Benjamin Daniel.

THE COURT: Well, what was the testimony that he gave that was helpful? Those are the things we have got to find out.

MR. FORRESTER: And I've offered to call the defendant to the stand, your Honor, or we can do it informally and maybe if Mr. Rita is allowed to stand up and expound on that.

THE COURT: No, no. I want you to tell me by proffer or I want him to testify.

MR. FORRESTER: Okay. I can tell you what I know about my client is this.

THE COURT: All right.

MR. FORRESTER: He worked over 17 years for what is now called the Department of Homeland Security.

[22] THE COURT: Okay.

MR. FORRESTER: During those times, both in New York and in Miami, he worked on immigration matters and other drug interdiction matters to where his testimony was used to put offenders away in prison. Those offenders threatened him directly and indirectly.

We have spent the last six months, and I have got letters to and letters from the New York City department where back in the '80s he worked with them concerning different drug matters, drug interdiction, and I've also written the Department of Personnel Management, to no success because they've been stalling.

I think Ms. Kay basically testified that she's also written concerning matters in his records that Mr. Rita states will show that there was a $50,000 bounty on his head to show

that he has testified in different matters to where he has been threatened to where sending him to jail, to prison, he's going to be amongst people he's helped put in jail, and his safety is in detriment.

THE COURT: Okay. So what you're saying is that he did this testimony because of the [23] work that he was employed to do in his livelihood that he testified against people he investigated?

MR. FORRESTER: That's correct.

THE COURT: And that as a result of that, some of those people are not happy with him and, therefore, he, like any policeman or sheriff or FBI agent who might be convicted of a crime, should be treated differently perhaps than other people because they may be subject to retribution. That's the theory?

MR. FORRESTER: That is the theory, and also that is the law according to Koon, Koon versus United States back in 19— I think '96 or '97.

THE COURT: I don't know that that's the law.

MR. FORRESTER: Well, that was the premise of the downward departure.

I'll read page 8 in my brief. In the present case, defendant has met the Koon criteria for vulnerability. Defendant is entitled to a two level departure because of the extraordinary notoriety of this case coupled with his status as a police officer [24] left him unusually susceptible to abuse in prison.

And to read on, defendant may have to spend most of his time in segregation.

Therefore, granting this motion would be appropriate.

THE COURT: Okay. All right. What else do you have that you want me to consider?

MR. FORRESTER: His military experience, your Honor.

THE COURT: All right, sir.

MR. FORRESTER: I'll spare you that. Do you want me to read that?

I don't want to read the case law, but I'll say this: He spent I believe, I don't want to be wrong, 24 years in our military, nine years active duty and fifteen years in the Reserves. And I will say this combination of factors: His physical impairment, vulnerability in prison and military service to this country would lead—would pray that this Court finds a downward departure is warranted in this case which is outside of the heartland of typical cases, your Honor.

I will say this: In addition to that, at [25] a time when most individuals are contemplating retirement options or different things to do with retirement, and certainly he lives in that area of the nation in Florida, Mr. Rita and his family are dealing with the negative consequences of this verdict on his road to purgatory was filled with many of good intentions.

He served this country on both a volunteer and I believe he was drafted—I'm sorry, volunteer. And also served in the Executive Branch by working with the Department of Justice. Placed his life on the line and also his family's life because his wife also works for the U.S. Government doing what most people say is probably the most important job right now, and that's border protection. That's what commentators if you watch them on the news, CNN, FOX, are saying are minding our borders, protecting our-boarders, number one. Ten years ago it used to be drug interdiction.

THE COURT: Are you saying border patrol work is the most hazardous duty work?

MR. FORRESTER: No, I'm not saying that. I'm saying some will argue it's the most [26] important.

THE COURT: Is the most important work for us to do?

MR. FORRESTER: Yes, yes.

THE COURT: Okay.

MR. FORRESTER: Obviously, the blemish to his character concerns the need for him to prove himself, and I think that's what this case comes down to. Okay?

I suspect a lot of that deficiency in Mr. Rita as far as him being technically correct come from some sort of deficiency from him falling short of his academic achievement earlier in life the first time around.

Certainly he's graduated with an Associate's in administration of arts, but as a child, as a young man, he left high school. He eventually got his GED.

However, in speaking with Mr. Rita, you'll find out that basically he can be tenacious as a book, and part of that comes from him having to always prove himself, and basically he had to grow up partly on his own in New York back in the '50s, '60s to where if you don't stand up for your right, you're going [27] to be stepped over.

But for that, you would see a humble man in front of you or you would see a humbler man at trial.

I say this, your Honor: The service this man has given to this country—I mean, it is appropriate that this Court take that and view it. As Booker would say, render a reasonable sentence to this man and his family, and that's it.

THE COURT: Mr. Forester, you simply have to excuse me because I'm failing to grasp some of the things that perhaps are being made clear to me and I just can't quite grasp them, but you're asking for a departure from the guidelines or a sentence under 3553 that is lower than the guidelines, and here are the reasons:

One, he is a vulnerable defendant because he's been involved in work which has caused people to become convicted

criminals who are in prison and there may be retribution against him.

Two, his military experience of 24 years, which include nine years active duty and 15 [28] years of Reserve duty, and I'm sorry, I missed the other categories after that. What are they?

MR. FORRESTER: Physical condition, your Honor. His health has been waning for the last four years.

THE COURT: Physical condition. What else?

MR. FORRESTER: I'm sorry?

THE COURT: What other categories?

MR. FORRESTER: Just three of them, your Honor.

THE COURT: Just three.

MR. FORRESTER: Physical condition, vulnerability in prison and the military service.

THE COURT: Well, the military experience would—what is that, because he has performed such good and extra-ordinary service for our country that he is entitled to special treatment?

MR. FORRESTER: Well, in addition to that, your Honor, I will say—well, I will say yes. I'm not privy to any extra-ordinary—actually, I am, and it's in the pre-sentence [29] report.

He has over 25 different medals—

THE DEFENDANT: Thirty-five.

THE COURT: Thirty-five I think it says.

THE DEFENDANT: Various medals, awards and nominations.

MR. FORRESTER: Yes, that is so. But in addition to that, I know that while in New York City he helped trained

different officers on the range, the shooting range with Immigration.

THE COURT: Okay. Thirty-five medals and training Immigration officers on the range.

MR. FORRESTER: Yes. He's also saying that he worked as a military intelligence officer with Covert Operative.

I've got some—

THE COURT: Are we going to get into that?

MR. FORRESTER: Are we going to get into?

THE COURT: To Covert Operations that he's been on. That may be secretive stuff.

MR. FORRESTER: Your Honor, I know the time is late, and if I need to proffer the appropriate evidence to convince this Court, then I—with all due respect, I would say [30] yes, your Honor.

I've got some more medicals right here. I think you have a copy of these matters up there. I want to believe so, but if not, I have no problem.

If I could drop these off and maybe your Honor could compare.

THE COURT: Okay. Well, I'm afraid that I might have missed something. So what I want you to do is take these back, these are the medical records, and show me the summary of what the doctors find his condition to be at that time in case I missed it. I want you to show that to me, Mr. Forrester.

Mr. Forester, have you looked at those?

MR. FORRESTER: I have looked at them, your Honor, but I have looked at other things that the letter concerning the Agent Orange we've discussed.

THE COURT: Is it in there?

MR. FORRESTER: Agent Orange, I don't believe.

THE DEFENDANT: Yes, Agent Orange is in there.

THE COURT: I saw a mention of Agent [31] Orange, that he complained of difficulties with that.

Is there a summary in there, Mr. Forrester?

MR. FORRESTER: There isn't a summary, your Honor, but the list I gave you which basically is the paraphernalia that I spoke about that he left down at the Marshal's Office. He couldn't bring them in, the medications.

THE DEFENDANT: The electronic equipment.

MR. FORRESTER: The electronic equipment.

That's probably the best summary.

THE COURT: Well, this—

MR. FORRESTER: I'll let you speak. It's a folded piece of paper of the first one.

THE COURT: Okay. Who did this document? Victor A. Rita, Jr.

THE DEFENDANT: I did.

THE COURT: 087365103. This is his summary of what he's taking?

MR. FORRESTER: It is, your Honor.

If I can proffer one last thing. I was just handed it by the U.S. Probation Officer.

THE COURT: All right, sir.

[32] MR. FORRESTER: That would pretty much summarize his ailments.

THE COURT: Now, here's a document, a letter from the Department of Veterans Affairs saying that they appreciate his having appeared and participated in the Agent Orange examination program. Your examination revealed that you have a history of DM Type 2 non-insulin requiring, whatever that is. I guess that's diabetes.

MR. FORRESTER: Yes, your Honor.

THE COURT: Sleep apnea, NTN elevated BP, hyperlipidemia, enlarged prostate, erectile dysfunction, skin rash, arthritis of your cervical spine, and acid reflux. Your PSA was initially elevated, and then repeat testing showed it was normal. Glucose, triglycerides and cholesterol were elevated. EKG normal and CAT scan was negative for chest or for malignancy.

Okay. I'll take this letter as an indication of what the Department of Veterans Affairs showed in 2004, May of 2004, a year ago.

Now attached to that is something else [33] that has completely different typing on it, but it talks about back and diabetes.

I'll take it from this that the back has caused him a lot of problems?

MR. FORRESTER: Yes, your Honor.

THE COURT: I don't know what I can take from this diabetes summary because I can't—I'm just not a medical doctor enough to read it. I'm not a medical doctor at all. I can't tell what this says about diabetes.

If you want to take that back and show me Mr.—hand that back to him, I'll try to tell you how to interpret it.

MR. FORRESTER: I'm sure the defendant can go into and explain it.

THE COURT: Well, I'm going to give you an opportunity to proffer, or he's going to have to testify then.

MR. FORRESTER: With the Court's indulgence, can I have a second?

THE COURT: Yes, sir.

Have you been privy to any of this information, Mr. Martens?

MR. MARTENS: Short answer, no.

THE COURT: What do you want to do here, [34] Mr. Forrester?

MR. FORRESTER: If I can have a second with my client.

THE COURT: Yes, sir.

MR. FORRESTER: But to answer that, you said any information. Some of that information he waived over, passed over.

THE COURT: Well, just now.

MR. FORRESTER: Oh, just now. Here you go.

THE COURT: That's all right. You just go ahead and find out what we're going to do here.

MR. FORRESTER: I'll proffer what was just said to me.

Basically with the uncontrolled diabetes, your Honor, he's losing sensation in his extremities, his hands, in his feet, bad blood circulation as far as generating oxygen towards different areas of his body.

THE COURT: That's what this will do for you, diabetes will do for you.

MR. FORRESTER: Yes.

THE COURT: How do I tell from that document what stage it's in or anything else?

[35] MR. FORRESTER: I believe I'm in the same boat you are, your Honor, because there is mention of it on here, but not being a medical doctor I can only take the word of my client when he talks about the pain he goes through, as far as the medication he has to take on a daily basis just to live what we would consider a self paranormal life as far as making sure that he doesn't ingest too much salt, trying to maintain his weight, as far as feeling numb at certain times during the day whether he's been resting or not active, or not having enough blood sugar or eating the right foods.

THE COURT: Okay. Essentially he's got to be very careful about his diet.

MR. FORRESTER: That's correct, your Honor.

THE COURT: All right. Well, most people with diabetes have to do that, don't they?

MR. FORRESTER: Yes, yes, I agree.

He just proffered that his diabetes has gotten worse. I would say this: Most people don't suffer from the long-term effects of Agent Orange which further complicates any illness that he might have.

[36] THE COURT: It very well may be true, but what we don't have is any—and I sympathize with him he is suffering from Agent Orange, and there is some indication on the letter that I saw that either they know he suffers from it or they know he contends he suffers from it, I don't know which, but I've got to find some basis of showing what that is doing for him in connection with these other things, and we don't have any medical on that, do we?

MR. FORRESTER: Well, I can only read from what's in front of me.

THE COURT : Please do.

MR. FORRESTER: And it says—and I'm not sure if this is related to diabetes. I'm not sure where it starts off.

It says headaches, stiffness, cervical, stiffness of the muscle. It talks about slowness. I guess this refers to his walk because it says gait.

THE COURT: Now, does that come from Agent Orange? Does it come from diabetes? Does it come from the bad back? Does the bad back come from Agent Orange?

MR. FORRESTER: Well, your Honor, I will [37] just submit this: That the source of it to a medical doctor it's pertinent and to your Honor I understand it's pertinent, but I know my client suffers from it.

Whether it's coming from Agent Orange, diabetes, the degenerative disc or just a combination of all three and the other ailments he has, he's feeling the effects of it meaning that whether the source is unknown or known, he's dealing with the effects of it. He's suffering the daily pain of these ailments.

Now—

THE COURT: Well, do you understand, Mr. Forrester, that many people suffer from diabetes, and the federal hospitalization system and the federal prison system is equipped to handle people with diabetes and many other difficult situations?

I am interested in the Agent Orange which many people do not suffer from, thank goodness, as being a possible area of looking to see what we should do in this case.

I don't mean to be ruthless, but diabetes in itself can be treated in the prison system almost as well as it can outside, and I'll [38] admit there may be some difference, but that doesn't persuade me. What may persuade me is to show what Agent Orange is doing, and I can't find it in those records.

MR. FORRESTER: Can I call Mr. Rita to the stand?

THE COURT: Is he going to be able to testify to what his symptoms are, or is he going to be able to show what Agent Orange has done?

MR. FORRESTER: He can testify to the symptoms, to the pain he's feeling and to the start date to when the symptoms came on, and I think that could probably pinpoint any general fashion concerning Agent Orange, your Honor.

THE COURT: All right. Why don't you just proffer that to me.

MR. FORRESTER: All right. Thank you. (The defendant and Mr. Forrester conferred.)

MR. FORRESTER: I'm prepared to proffer that the onset of gum disease, the rashes, the headaches were at the end of 1969.

He served—his tour in Vietnam was from 1968 to 1969. At the end of that tour he started to have gum disease, rashes, headaches, [39] migraines, and after that tour he was about the age of 23, and there's no history of diabetes, at least Type 2 diabetes or any sort of diabetes in his family. He started to have symptoms of that soon thereafter. I would suspect that about age 24, 25, your Honor.

THE COURT: Well, all right. Are those symptoms from the fallout from Agent Orange?

MR. FORRESTER: Yes, sir.

THE COURT: Do we have some medical evidence of that?

Does he anywhere have a letter at any time from a doctor who has examined him and said you have, or does he have anything to show that he was a victim of Agent Orange, induction of Agent Orange, and if so, does he then have any medical evidence that would say Judge, you should un-

derstand that these are the results he's having from Agent Orange and therefore you—forget the last point.

MR. FORRESTER: Your Honor, I'll say this: We signed a waiver of the Rule 32 procedure, and in signing that, I went over and I said with Mr. Rita we can send away for all this information and, you know, it might take [40] longer than June 7th before we get them, however, I know that these ailments are going to be in your pre-sentence report, and usually that's why we go over and say do you accept what's in the pre-sentence report.

In paragraph 55 I believe, which is page 9, they're all here.

THE COURT: Okay. Do you want me to accept that as his medical?

MR. FORRESTER: Yes, I do, your Honor.

THE COURT: Mr. Martens, what do you say about that?

MR. MARTENS: I have no objection at this time, your Honor.

THE COURT: I'll accept that as the medical.

MR. FORRESTER: Thank you, your Honor.

THE COURT: Anything else that you want me to take into consideration?

MR. FORRESTER: Not by with consideration, but just wanted to say thank you to Mr. Martens. He—I understand that he had gleaned over whether to file a motion for upward departure. He hasn't, and we say to the Government thank you.

[41] THE COURT: Mr. Martens, do you wish to be heard on. an appropriate disposition here?

MR. MARTENS: If you want to hear from me at this hour, I would.

THE COURT: Well, we're going to start again at nine o'clock in the morning. If you feel more prepared at that time, I'll hear you then but—

MR. MARTENS: I'm plenty prepared.

THE COURT: All right.

MR. MARTENS: Whatever the Court wants.

THE COURT: Let's go.

MR. MARTENS: I guess I'd start by saying this: I think a lot of people, I think unfortunately a lot of even U.S. Attorneys' Offices don't view obstruction and perjury and crimes of that sort as things worthy of effort and time in pursuing, and I happen to actually strongly disagree with that perspective.

In fact, if you can believe it, Mr. Rita is the first of five obstruction or perjury prosecutions that I've brought or am about to bring in the last year.

It seems to be that people think that when you take an oath you can say whatever you [42] want whether it's true or not.

Mr. Rita appeared before the grand jury in the course of when this U.S. Attorneys' Office most important investigations involving the smuggling of fully automatic machine guns, thousands of them into the United States and selling them to people around the country, many of whom were convicted felons or violent people.

It was an important investigation of this office, and Mr. Rita was called because his name came up during the investigation. I know some of this was recounted back at the time of the trial.

Mr. Rita was not a target at the time. He would never have been a target as far as I'm concerned if he had simply told us what he knew.

What we were trying to get at at the time was whether or not the company under investigation known as InterOrdnance was obstructing our investigation by telling buyers of these firearms parts kits, which were essentially machine guns, not to cooperate with the Government and not to hand over the guns.

[43] Mr. Rita was one of those purchasers, and he spoke with an ATF agent who asked him if he would return his parts kit.

Immediately after getting off the phone with the agent, he got on the phone with InterOrdnance and spoke for I believe about seven minutes in the telephone call.

We simply wanted to know what happened after you got off the phone with the agent that caused you ultimately not to give your parts kit back to the ATF agent.

I spent as much time as I could, asked as many questions as I could in the grand jury giving Mr. Rita every opportunity to tell the truth to tell us what happened, and he answered he had not spoken with InterOrdnance after speaking with the ATF agent, and that was simply false because I obtained his telephone records thereafter, and within an hour and a half of speaking with the ATF agent, he was on the phone for a lengthy call with InterOrdnance.

It is unfortunate at the end of the day that Mr. Rita is here and has become a target of this investigation because that was never [44] intended. We simply wanted his help as a sitting law enforcement officer himself at the time in helping us prosecute what we believe was a dangerous company engaged in dangerous activity.

He was a law enforcement officer, and it's unfortunate—and it's even more unfortunate that he was a law enforcement officer after having previously been convicted, because if you review the pre-sentence report, you see that this isn't the first time Mr. Rita has lied when it comes to firearms, but back in

the '80s he was convicted while a law enforcement officer of lying on firearm permit applications.

Somehow, and it escapes me, I even know the AUSA who prosecuted Mr. Rita. It turns out by happenstance he's a friend of mine living in the New York City area where I grew up.

I called him and talked about this case, and no one can seem to explain but for whatever reason Mr. Rita got a second chance as a law enforcement officer even after his prior trial and conviction on making false statements on firearm applications.

[45] You would have thought if anyone knew the importance of telling the truth, that given Mr. Rita's prior convictions, given his years of service as a law enforcement officer, given I believe he testified in grand jury he knew about the 1001 statute, given his work as an asylum officer, if anybody should have known the importance of telling the truth, you would have thought that Mr. Rita did, yet he persisted repeatedly in providing false answers to the grand jury.

He was very belligerent, in fact, in the grand jury in his attitude because he viewed I didn't want to accept his answers when in fact it turns out that I was right, his answers were false, and the jury itself, not just the grand jury, but the jury agreed.

Mr. Forester is right. I actually gave consideration to filing an upward departure motion under 5K2.7 which allows an upward departure for significant disruption of the governmental function because I have concern, and we've already taken steps with the U.S. Attorneys Office in Miami to go back and see whether or not because of Mr. Rita's perjury [46] conviction that there's any defense counsel perhaps in any of the cases that he was involved with that we might need to notify.

When I initially got the statement that he submitted to probation, it said he had testified earlier this year. Unfortunately, this statement wasn't dated, and I wasn't clear if that was earlier in 2005 or earlier in 2004, and we still have the U.S. Attorneys' Office down there just attempting to locate whether there are any cases.

But I decided, you know, I'm not here to pile on. I didn't want to make a motion for an upward departure. But I do feel strongly that what Mr. Rita did was not an innocuous crime. It was not a trivial matter.

Our system only works—and you know this better than me obviously—that our system only works when people tell the truth. That's what our system is built on. That the oath means something. That it's not just a perfunctory matter that we have to get out of the way before somebody takes the stand.

Mr. Rita—if anybody knew it, Mr. Rita knew it, yet he chose to lie in the grand jury, [47] and as a result, we're here today.

I would ask this Court to take Mr. Rita's prior history into account, not just his prior sickness or prior military service. I commend anyone who served in Vietnam or in the Gulf War, but to take his history as a law enforcement officer and hold it against him because if anybody should have known how to behave in a grand jury, Mr. Rita should have known.

Thank you.

THE COURT: All right. Thank you, sir.

Mr. Rita, you're not required to say anything at this point, and if you elect to say nothing, that fact will not be held against you. However, this is a serious matter to you, I suspect. It is to the Court.

If there's anything you want me to hear from you in addition to what your attorney has said on your behalf, Mr. Forrester, I'd be glad to hear from you.

THE DEFENDANT: Yes, sir. There is a certain amount of nervous on my part.

THE COURT: I suspect so. I would be, too.

[48] THE DEFENDANT: There is a certain amount of mixed emotions.

I want to clear up some points that I think need to be cleared up, and then I'd like to more or less tell you what I feel at the end and that will be my finishing statement.

The medical information and the documents that you were reviewing earlier, your Honor, those were documents provided to me by the pre-sentencing officer requesting certain information. The information was provided to the pre-sentencing officer with the documents requesting it.

I don't think you were supposed to see those. I think you just were supposed to see the end result. So I can understand why there's a certain confusion not understanding why those documents were given to you.

My medical condition dates back to when I was in Vietnam and started getting more and more noticeable several years after I left.

Initially right there in Vietnam I started getting skin rashes. I started getting gum disease. I started getting headaches, digestive problems and all that.

[49] That is documented, but I believe that's what the military medical records that go back to 1968 to '69. If I thought they were important at the time, I probably would have requested them under the Freedom of Information Act. I didn't know I needed to do that.

I thought I was complying with the Court's request by providing at least a year and a half of my medical records—my complete medical history records to, you know, show my point about my illnesses and all that.

Everything that's in that one fold of document that Mr. Forrester gave you is a compilation of all the medicines, all the machinery, everything I have to do. There is no final draft or anything on it, but if you go through the medical records it will support each individual prescription, each individual procedure that I'm supposed to take and everything.

As far as being a law enforcement officer, I was originally a criminal investigator for Immigration. That was from 1978 to 1986 when I was terminated because of the problem I had with the courts because of [50] the wrong address being used on firearm applications.

I agree with Mr. Martens one hundred percent. I did respect and cherish the opportunity to have a second chance, even though I felt I was unduly terminated and charged with lying on the documents, but I appreciate it.

I love my family. I consider myself a family man. I would not lie to save myself any embarrassment or anything. So because of this second chance, it would be even less reason for me to do anything out of the ordinary.

In this particular case, sir, there are several victims here: Myself, the Court, and my family.

The Agent Levin perjured herself—

THE COURT: Now, wait a minute. Before you get into that—

THE DEFENDANT: Yes, sir.

THE COURT: —indicating that you love your family and your children.

THE DEFENDANT: Yes, sir.

THE COURT: When have you last seen your children?

[51] THE DEFENDANT: Well, they left me off at the airport when I came over here at 10:30 this morning, sir.

THE COURT: This says that you've had no contact with your children in about 20 years.

THE DEFENDANT: That's my previous family, sir. I'm divorced and remarried.

THE COURT: All right. So those children you have no contact with?

THE DEFENDANT: No, sir. The sad part of is it my original first wife turned the children against me and they didn't want to have any contact with me at all. That's why I cherish my family now more so.

THE COURT: Now back to the agent testifying falsely against you. Remember, that a jury has heard that now.

THE DEFENDANT: Yes, sir.

THE COURT: And has made a decision.

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Proceed.

THE DEFENDANT: They may have made the decision, but that doesn't change the fact that she perjured herself, sir.

Secondly, to be civil and to give [52] Mr. Martens the benefit of the doubt, I believe he may have initiated a modern day version of the inquisition. He was so tied up with this major case that he forgot to actually look at what was going on. In his mind I was guilty and that was it, period. No matter what I said, what I did, I was guilty.

It bothers me that my family is going through this. It bothers me that I have to be before you here today.

I don't know if Mr. Martens is an evil man. I don't know if he has lost sight of this project that he was doing. All I know is that I'm the victim, sir.

I did not lie in the grand jury.

There was a question of one part of the testimony that I think may be the whole crux of this whole thing here is that I made phone calls.

When Mr. Martens was making his presentation now, as he did during the trial, he admitted the fact that I made the phone call. I admitted making the phone call about the RPK kit, not about the PPSH kit which is the one that was in question. And then my [53] grand jury testimony when I said I did not call the company, I did not call the company about the PPSH kit.

THE COURT: Remember, now I'll hear you, but this is a question of what to do, not a question of whether the jury did right or not. That's been decided.

THE DEFENDANT: Well, the jury—

THE COURT: This is a question of what to do on the things that Mr. Forester has asked us to give consideration to.

Proceed.

THE DEFENDANT: From what Mr. Forester has told me, that this is my opportunity to be heard, and it's been bottled up in me. I'd like to make my emotions and my feelings and my thoughts made to the Court.

I'm innocent. I will try to the best of my ability to try and appeal this case.

I understand there's two parts to it; there's the sentencing part and then there's the actual conviction itself.

THE COURT: Right.

THE DEFENDANT: Mr. Martens said there's nothing to appeal until you're actually [54] convicted. So I'm not addressing that at this point. The actual conviction itself to overturn that I will try that now.

I think one of the contributing factors to my inability to have a proper defense was the lack of funds, lack of money,

location, having to come up here. I'm currently in about $30,000 worth of debt as a result of this.

THE COURT: As a result of this case?

THE DEFENDANT: Yes, sir.

THE COURT: Well, you seem to have a pretty good cash flow.

THE DEFENDANT: No, sir. That was when I was working. After I retired, it went down to zip.

Right now I get about $2,000 a month money from my retirement. I get about $600 from my disability which I have—the VA has recognized about 40—about 50 percent disability at this point, and the little money that I make as a dispatcher at night. So I don't have these funds available.

THE COURT: So you don't get $1,156 a month?

THE DEFENDANT: No, sir.

[55] THE COURT: And you don't get spouse's salary of $1,698?

THE DEFENDANT: That would be her salary, yes, sir.

THE COURT: Okay. And federal annuity of $2,009?

THE DEFENDANT: Yes, sir.

THE COURT: Sir?

THE DEFENDANT: Yes, sir.

THE COURT: And Veteran's pension of $612?

THE DEFENDANT: Yes, sir.

THE COURT: So you and your wife would have $5,400.75 a month?

THE DEFENDANT: I haven't done the figures, but that sounds about right, sir.

THE COURT: And your expenditures are approximately $4,500 a month?

THE DEFENDANT: Some months more, some months less.

THE COURT: So that would leave you a monthly cash flow of approximately $950 or a little less?

THE DEFENDANT: Again, without doing the numbers. I know I had to sit down diligently [56] with my wife and try to come up with some sort of exact representation of what our bills were and all that, but things have gone up and gas has gone up.

THE COURT: And then coming up with that figure for meals, groceries and lunches, $1,500 a month for the two of you?

THE DEFENDANT: No, it's the four of us, sir.

THE COURT: For the four of you.

THE DEFENDANT: It's four of us, plus I help out my mother-in-law as well. She's in an old age home, but I help out as much as I can.

THE COURT: All right. Proceed.

THE DEFENDANT: So I do regret being here today, and like I said, between mixed emotions I find it very—it's unbelievable that an innocent man could be facing a judge at this point in this situation.

And again, I—you know, I don't know if Mr. Martens is an evil man or not. I don't know if he's just losing sight of this thing, or if I just fall into the cracks. I just don't know. All I know is I have told the truth from day one.

[57] Mr. Forester has brought up some things that may have contributed to this misunderstanding from my original attorney, but I'm here today. I will do the best I can to try to

prove my innocence regardless of whatever you decide to do today, sir.

It just offends me that my family is being put through this for no reason at all other than someone going on an inquisition, and I just happen to meet the criteria that they wanted.

THE COURT: Okay.

THE DEFENDANT: I thank you for your patience and I thank you for your diligence because I can see you're actually listening to me and it's not going over your head. You're actually listening to me, and I appreciate that considering this is the first time I really had a chance to say anything.

If there's any questions or documents—just one other thing. The cards, the business cards that I gave to Ms. Kay was for her to independently verify that in fact I've worked with these agencies and involved in hijackings and kidnappings and murders on behalf of the [58] Government and testified against people who have been incarcerated, people who have been returned back to their countries, and I take personal offense that he's painting a brush, he's painting a brush on my testimony for the cases I did for the Government as being questioned at this point.

THE COURT: No. You'll have to—from my perspective, Mr. Martens did not address the work that you say you had done for the other agencies. I'm the one who held that up and said I see these cards here, but that doesn't tell me anything.

I think my comment at that point was I don't know whether he helped to find seven terrorists or whether he gave some information that they need to clean up their act in the FBI, but that was not to say anything except I couldn't make anything from the fact that I had these cards in front of me.

THE DEFENDANT: No. I would specifically refer to the grand jury subpoena issued by the U.S. Attorney in the case that he's questioning or painting a brush that—

THE COURT: Oh.

[59] THE WITNESS: —my testimony there might have been questionable.

As far as terrorists, yes, I have, I've assisted in incarcerating and identifying terrorists, spies, illegal aliens, drug dealers, smugglers, rapists, child abusers as a non-law enforcement officer with the U.S. Government and Immigration. An Immigration asylum officer is not a law enforcement officer.

THE COURT: Okay.

THE DEFENDANT: Okay? That's another sore point with me on that.

Mr. Martens purposely misled the grand jury—the trial jury and the Court in that I was a law enforcement officer when he knew all along that I was not a law enforcement officer, and there's testimony in the grand jury to that effect that he knows I am not a law enforcement officer, yet he repeatedly uses that for special effect to make things worse than what they really are.

I am familiar with 1001. I am familiar with testifying before a grand jury, and I assure, your Honor, you know, words can only go [60] but so far. I wish you could look into my heart and see for yourself.

I did not falsely testify before the grand jury. If anything, I told them exactly what was going on and exactly what happened. And again, if it wasn't for the perjured testimony by Agent Levin and Mr. Martens running with that, there would be no reason why I would be here today.

At any point I would have assisted the Government in any criminal investigation whether I was an investigator or law enforcement officer or not. I was never asked. I was never approached, and I would have been more than happy to help if I could have.

THE COURT: All right.

THE DEFENDANT: I think the day is late. I don't want to go on past. I think I've gotten my point across to the Court.

I thank you, your Honor.

THE COURT: All right. Thank you very much. I appreciate your comments, Mr. Rita.

MR. FORRESTER: Your Honor, if I can just say, not to belabor any point, but as you've heard my client say, he's taken this very [61] personally.

THE COURT: I'm sure he has.

MR. FORRESTER: I just want to say on behalf of myself and my client that even though you've heard some things that might be slanderous to the U.S. Attorney, I will say this: I've discussed with Mr. Rita certain actions he could have taken. I said, you know—meaning as far as subpoenaing records, change continuing the date, at least file a motion to continue this date until we get those records, and I say that to say as facetious as his personal statements might be, he's certainly one that's not necessarily I would call a loose canyon. He's just one deeply hurt by things.

I would say this: I don't think Mr. Martens is an evil person. However, the fact is that we went to trial, we lost, and he's hurt.

If you could do this: There is going to be a sentence. He lives in the Miami area. Obviously a federal institution in that area and self-surrender would be appropriate, your Honor.

[62] THE COURT: All right. Thank you, sir.

The Court has reviewed the sentencing guidelines with respect to the charges here of Title 18 of USC 1623, making a false declaration, 18 USC 1001 and 1503, and the Court finds those to be serious matters.

The Court is not able to evaluate the seriousness of the criminal investigation which was going on of which the Government considered Mr. Rita to have some important testimony and felt that Mr. Rita did not give truthful testimony to.

The Court is unable to find that the sentencing guideline range which is set forth there that we've already discussed is an inappropriate guideline range for that, and under 3553, certainly the public needs to be protected if it is true, and I must accept as true the jury verdict that Mr. Rita violated the laws that he is accused of violating, all five of them.

So the Court finds that it is appropriate to enter the following sentence: It is adjudged that Mr. Rita should be committed to the custody of the Bureau of Prisons for a [63] period of 33 months.

It is further ordered that upon—that's on all of the counts and it should be concurrently running.

Upon his release from imprisonment, he shall be on supervised release for a period of three years on each of the counts, and they should run concurrently with each other.

The Court has reviewed the imposition of a fine and while it finds that Mr. Rita probably does have a sufficient income from his wife and his own income so that he has some cash flow, out of an abundance of caution and care about this Agent Orange business which may cause some of the problems, the Court will not impose a fine as to Mr. Rita.

There is a special assessment of a $100 on each of the five counts which will be due and payable.

Can that be paid, Mr. Forrester?

MR. FORRESTER: Yes, your Honor.

THE COURT: When can that be paid?

THE DEFENDANT: Now.

MR. FORRESTER: I believe he has the money on him right now.

[64] THE CLERK: The Clerk's Office closed at four, and they already closed out the money for the day.

THE COURT: Okay. Mr. Forester, it's not necessary for him to be here, but you may bring that money tomorrow. Today is Tuesday.

MR. FORRESTER: Yes.

THE COURT: That should be paid in the offices of the clerk by tomorrow afternoon. Is that all right?

MR. FORRESTER: Thank you.

THE COURT: Four o'clock. Before that time tomorrow afternoon.

The conditions of supervised release are as follows: One, he shall abide by the standard conditions of supervised release and—well, Ms. Kay, is there anything else that you feel that's appropriate, specifically in this case other than the general conditions of probation or supervised release?

PROBATION OFFICER KAY: No, sir. We may want to recommend the BOP to adhere to his medical needs.

THE COURT: I'm going to do that in just a moment.

[65] PROBATION OFFICER KAY: Okay. Then that's it.

THE COURT: All right.

The Court recommends that Mr. Rita—based on the number of complaints which he has, which may be very valid complaints, the Court recommends to the Bureau of Prisons that it afford him an opportunity to be housed in an institution where he can receive the medical treatment and medicines which he is required to take.

So the Court urges the Bureau of Prisons to give careful attention to the condition of Agent Orange or any other condition which Mr. Rita may be affected in sentencing him—in housing him in an appropriate institution.

Because Mr. Rita is from the Miami area and because of the medical condition which he has raised, the Court first of all and primarily recommends that he goes to an institution where he can get this medical treatment, this help, but secondly, if it can be, that he be housed in an institution in the Southeastern part of the United States which is a little closer to his home base than North [66] Carolina might be, but that's a secondary request.

Mr. Martens, is there anything else you wish me to address here?

MR. MARTENS: No, sir.

THE COURT: Mr. Forester, is there anything else you wish me to address here?

MR. FORRESTER: Just to reiterate the point about self-surrendering, your Honor.

THE COURT: Any objection to that, Mr. Martens?

MR. MARTENS: Not at all.

THE COURT: The defendant shall report to the institution to which he's assigned for service of this sentence on or before—five weeks would be what? July the 12th, 2005, on or before twelve o'clock noon on that day.

You will be assigned an institution and you will report directly to that institution—

THE DEFENDANT: Yes, sir.

THE COURT: —Mr. Rita.

THE DEFENDANT: Thank you, your Honor.

THE COURT: Anything else?

Now, Mr. Rita, you may know this already, but listen to me anyway.

[67] You have an absolute right to appeal everything that has taken place in this case. Talk to Mr. Forester and listen to what he has to say, but in the final analysis you must make up your own mind about what you want to do.

If you decide that you want to appeal and cannot pay an attorney to represent you, then one would be appointed for you. In view of the financial statement that we have here, I don't know whether you are eligible or not, but you certainly would be considered if you asked to be.

Listen to what he has to say and then make up your own mind, and if you are found to qualify, then the Court will appoint an attorney to represent you without cost to you.

If you're going to appeal, you got to get that notice in within ten days of the entry of this judgment or you lose that right.

Now, is there anything else that I just said about an appeal that you do not understand?

THE DEFENDANT: Again, I believe there's two appeals we're talking about here; the appeal of the sentence that you're providing me [68] now and then there's appeal of the conviction itself.

THE COURT: All of that is part of the same appeal. So there's one appeal raising at least two issues.

THE DEFENDANT: I would ask the Court then to help me provide legal counsel because I can no longer retain Mr. Forester, and I've notified him in writing to that effect.

THE COURT: You may file such a motion. First you would want to file—if you decide to appeal, you would want to file your notice of appeal. Then you may make an application. I won't hear that. It will be heard in Charlotte.

Some other judge will hear it either here or in the Fourth Circuit and decide whether to appoint an attorney or not.

So you understand what your rights are?

THE DEFENDANT: Yes, sir, but I'm not sure of the mechanics on it. I have a ten day period to file an appeal?

THE COURT: From the date that I sign the judgment.

THE DEFENDANT: And that will be as of when?

[69] THE COURT: Whenever it gets to me, which may be a week or two.

THE DEFENDANT: All right, your Honor.

MR. FORRESTER: Your Honor, I think I've told my client that I would file the notice of appeal.

THE COURT: Okay.

THE DEFENDANT: But that's not the appeal itself?

THE COURT: That's the notice. Then you got to ask for an attorney. If you're going to ask for an attorney, then the Court will make a decision on whether you're entitled to have appointed counsel.

THE DEFENDANT: All right, Judge.

THE COURT: And then the appeal will go forward from there.

All right. Thank you very much. I apologize for holding you all here this afternoon so long, but thank you very much.

All right. Let's recess Court.

* * * *

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

[Filed JUN 18, 2005]

DOCKET NO. 3:04CR105

UNITED STATES OF AMERICA,

vs.

VICTOR A. RITA, JR.,
Defendant/Appellant.

NOTICE OF APEAL

NOW COMES the Pro Se Defendant, Victor A. Rita, Jr., and respectfully gives notice of is claim of appeal to the Court of Appeals for the Fourth Circuit from the judgment and sentence entered in the above-captioned case. I have exhausted funds from my savings for the cost of attorney's fees and travel related expenses to contest this matter at the trial level. This Pro Se Appellant respectfully requests this Honorable Court to waive filing fee and also appoint counsel to assist him in this direct appeal.

This the 17th day of June 2005.

/s/ Victor A. Rita, Jr.
VICTOR A. RITA, JR.
Pro Se Defendant
1395 NE 132nd Street
North Miami Beach, FL 33161
(305) 893-7115

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA

[Filed JUN 27, 2005]

File Number CR-04-105

UNITED STATES OF AMERICA,

v.

VICTOR A. RITA, JR.

NOTICE OF APPEAL

Notice is hereby given that Victor A. Rita, Jr. (defendants) in the above named case,* hereby appeal to the United States Court of Appeals for the Fourth Circuit, Richmond Virginia, entered in this action on the day of 21 June, 2005.

(s) Victor A Rita, Jr

Attorney for (In Forma Pourperis)

Address: 1395 North East 132nd Street
North Miami FL. 33161

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* See Rule 3(c) for permissible ways of identifying appellants.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

[Filed JUL 1, 2005]

Case Number: 3:04CR105
USM Number: 19614-058
Denzil H. Forrester
Defendant's Attorney

UNITED STATES OF AMERICA,

v.

VICTOR A. RITA, JR.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed on or After November 1, 1987)

THE DEFENDANT:

__ Pleaded guilty to count(s).
__ Pleaded nolo contendere to count(s) which was accepted by the court.
X was found guilty on count(s) 1-5 after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title and Section	Nature of Offense	Date Offense Concluded	Counts
18:1623(a)	Making false declarations.	10/27/03	1 & 3
18:1001(a)(2)	Making false statements and representations.	10/27/03	2 & 4
18:1503	Obstruction of justice	10/27/03	5

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the

Sentencing Reform Act of 1984, *United States v. Booker*, 125 S.Ct. 738 (2005), and 18 U.S.C. § 3553(a).

__ The defendant has been found not guilty on count(s).
__ Count(s) (is)(are) dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay monetary penalties, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence: 6/7/05

_____
Signature of Judicial Officer

William L. Osteen
United States District Judge

Date: /s/ William L. Osteen
July 1, 2005

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of *Counts 1 - 5: THIRTY THREE (33) MONTHS each count to run concurrently.*

X The Court makes the following recommendations to the Bureau of Prisons:

1. Defendant be housed at an institution where he can receive medical treatment and medicines which he is required to take. The Court urges BOP to pay careful attention to Agent Orange or any condition which may affect housing him in an institution.

2. Because Mr. Rita is from Miami and medical issues have been raised the Court recommends that defendant be housed in an institution in the Southeastern United States as a secondary request.

__ The defendant is remanded to the custody of the United States Marshal.

__ The defendant shall surrender to the United States Marshal for this district:

__ At __ On __.

__ As notified by the United States Marshal.

X The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

X before 12:00 noon on July 12, 2005.

__ As notified by the United States Marshal.

__ As notified by the Probation or Pretrial Services Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ To _____
At _____, with a certified copy of this Judgment.

United States Marshal

By

Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of *Counts 1 - 5: THREE (3) YEARS each count to run concurrently.*

__ The condition for mandatory drug testing is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the standard conditions that have been adopted by this court and any additional conditions ordered.

1. The defendant shall not commit another federal, state, or local crime.
2. The defendant shall refrain from possessing a firearm, destructive device, or other dangerous weapon.
3. The defendant shall pay any financial obligation imposed by this judgment remaining unpaid as of the commencement of the sentence of probation or the term

of supervised release on a schedule to be established by the court.

4. The defendant shall provide access to any personal or business financial information as requested by the probation officer.
5. The defendant shall not acquire any new lines of credit unless authorized to do so in advance by the probation officer.
6. The defendant shall not leave the Western District of North Carolina without the permission of the Court or probation officer.
7. The defendant shall report in person to the probation officer as directed by the Court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
8. A defendant on supervised release shall report in person to the probation officer in the district to which he or she is released within 72 hours of release from custody of the Bureau of Prisons.
9. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
10. The defendant shall support his or her dependents and meet other family responsibilities.
11. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other activities authorized by the probation officer.
12. The defendant shall notify the probation officer within 72 hours of any change in residence or employment.
13. The defendant shall refrain from excessive use of alcohol and shall not unlawfully purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as duly prescribed by a licensed physician.

14. The defendant shall participate in a program of testing and treatment or both for substance abuse if directed to do so by the probation officer, until such time as the defendant is released from the program by the probation officer; provided, however, that defendant shall submit to a drug test within 15 days of release on probation or supervised release and at least two periodic drug tests thereafter for use of any controlled substance, subject to the provisions of 18:3563(a)(5) or 18:3583(d), respectively.
15. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
16. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
17. The defendant shall submit his person, residence, office or vehicle to a search, from time to time, conducted by any U.S. Probation Officer and such other law enforcement personnel as the probation officer may deem advisable, without a warrant; and failure to submit to such a search may be grounds for revocation of probation or supervised release. The defendant shall warn other residents or occupants that such premises or vehicle may be subject to searches pursuant to this condition.
18. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed by the probation officer.
19. The defendant shall notify the probation officer within 72 hours of defendant's being arrested or questioned by a law enforcement officer.

20. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.
21. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
22. If the instant offense was committed on or after 4/24/96, the defendant shall notify the probation officer of any material changes in defendant's economic circumstances which may affect the defendant's ability to pay any monetary penalty.
23. If home confinement (home detention, home incarceration or curfew) is included you may be required to pay all or part of the cost of the electronic monitoring or other location verification system program based upon your ability to pay as determined by the probation officer.

ADDITIONAL CONDITIONS:

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments.

ASSESSMENT	FINE	RESTITUTION
$500.00	$0.00	$0.00

FINE

The defendant shall pay interest on any fine or restitution of more than $2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

X The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

X The interest requirement is waived.

__ The interest requirement is modified as follows:

COURT APPOINTED COUNSEL FEES

__ The defendant shall pay court appointed counsel fees.

__ The defendant shall pay $____ Towards court appointed fees.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A __ Lump sum payment of $____ Due immediately, balance due

__ Not later than _____, or

__ In accordance __ (C), __ (D) below; or

B X Payment to begin immediately (may be combined with __ (C), __ (D) below); or

C __ Payment in equal _____ (E.g. weekly, monthly, quarterly) installments of $_____ To commence ____(E.g. 30 or 60 days) after the date of this judgment; or

D __ Payment in equal ___ (E.g. weekly, monthly, quarterly) installments of $_____To commence ___ (E.g. 30 or 60 days) after release from imprisonment to a term of supervision. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. Probation Officer shall pursue collection of the amount due, and may request the court to establish or modify a payment schedule if appropriate 18 U.S.C. § 3572.

Special instructions regarding the payment of criminal monetary penalties:

__ The defendant shall pay the cost of prosecution.
__ The defendant shall pay the following court costs:
__ The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States District Court Clerk, 401 West Trade Street, Room 210, Charlotte, NC 28202, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. All criminal monetary penalty payments are to be made as directed by the court.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

[Filed AUG 30, 2005]

Case Number: 3:04CR105
USM Number: 19614-058
Denzil H. Forrester
Defendant's Attorney

UNITED STATES OF AMERICA,

v.

VICTOR A. RITA, JR.

AMENDED JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed on or After November 1, 1987)

THE DEFENDANT:

__ Pleaded guilty to count(s).
__ Pleaded nolo contendere to count(s) which was accepted by the court.
X was found guilty on count(s) 1-5 after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title and Section	Nature of Offense	Date Offense Concluded	Counts
18:1623(a)	Making false declarations.	10/27/03	1 & 3
18:1001(a)(2)	Making false statements and representations.	10/27/03	2 & 4
18:1503	Obstruction of justice	10/27/03	5

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the

Sentencing Reform Act of 1984, *United States v. Booker*, 125 S.Ct. 738 (2005), and 18 U.S.C. § 3553(a).

__ The defendant has been found not guilty on count(s).
__ Count(s) (is)(are) dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay monetary penalties, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence: 8/15/05

/s/ William L. Osteen
Signature of Judicial Officer

William L. Osteen
United States District Judge

Date: August 30, 2005

Amended to remove report date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of *Counts 1 - 5: THIRTY THREE (33) MONTHS each count to run concurrently.*

X The Court makes the following recommendations to the Bureau of Prisons:

1. Defendant be housed at an institution where he can receive medical treatment and medicines which he is required to take. The Court urges BOP to pay careful attention to Agent Orange or any condition which may affect housing him in an institution.

2. Because Mr. Rita is from Miami and medical issues have been raised the Court recommends that defendant be housed in an institution in the Southeastern United States as a secondary request.

__ The defendant is remanded to the custody of the United States Marshal.

__ The defendant shall surrender to the United States Marshal for this district:

__ At __ On __.

__ As notified by the United States Marshal.

X The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

__ As notified by the United States Marshal.

__ As notified by the Probation or Pretrial Services Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ To _____
At _____, with a certified copy of this Judgment.

United States Marshal

By

Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of *Counts 1 - 5: THREE (3) YEARS each count to run concurrently.*

__ The condition for mandatory drug testing is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the standard conditions that have been adopted by this court and any additional conditions ordered.

1. The defendant shall not commit another federal, state, or local crime.
2. The defendant shall refrain from possessing a firearm, destructive device, or other dangerous weapon.
3. The defendant shall pay any financial obligation imposed by this judgment remaining unpaid as of the commencement of the sentence of probation or the term

of supervised release on a schedule to be established by the court.

4. The defendant shall provide access to any personal or business financial information as requested by the probation officer.
5. The defendant shall not acquire any new lines of credit unless authorized to do so in advance by the probation officer.
6. The defendant shall not leave the Western District of North Carolina without the permission of the Court or probation officer.
7. The defendant shall report in person to the probation officer as directed by the Court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
8. A defendant on supervised release shall report in person to the probation officer in the district to which he or she is released within 72 hours of release from custody of the Bureau of Prisons.
9. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
10. The defendant shall support his or her dependents and meet other family responsibilities.
11. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other activities authorized by the probation officer.
12. The defendant shall notify the probation officer within 72 hours of any change in residence or employment.
13. The defendant shall refrain from excessive use of alcohol and shall not unlawfully purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as duly prescribed by a licensed physician.

14. The defendant shall participate in a program of testing and treatment or both for substance abuse if directed to do so by the probation officer, until such time as the defendant is released from the program by the probation officer; provided, however, that defendant shall submit to a drug test within 15 days of release on probation or supervised release and at least two periodic drug tests thereafter for use of any controlled substance, subject to the provisions of 18:3563(a)(5) or 18:3583(d), respectively.
15. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
16. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
17. The defendant shall submit his person, residence, office or vehicle to a search, from time to time, conducted by any U.S. Probation Officer and such other law enforcement personnel as the probation officer may deem advisable, without a warrant; and failure to submit to such a search may be grounds for revocation of probation or supervised release. The defendant shall warn other residents or occupants that such premises or vehicle may be subject to searches pursuant to this condition.
18. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed by the probation officer.
19. The defendant shall notify the probation officer within 72 hours of defendant's being arrested or questioned by a law enforcement officer.

20. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.
21. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
22. If the instant offense was committed on or after 4/24/96, the defendant shall notify the probation officer of any material changes in defendant's economic circumstances which may affect the defendant's ability to pay any monetary penalty.
23. If home confinement (home detention, home incarceration or curfew) is included you may be required to pay all or part of the cost of the electronic monitoring or other location verification system program based upon your ability to pay as determined by the probation officer.

ADDITIONAL CONDITIONS:

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments.

ASSESSMENT	FINE	RESTITUTION
$500.00	$0.00	$0.00

FINE

The defendant shall pay interest on any fine or restitution of more than $2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

X The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

X The interest requirement is waived.

__ The interest requirement is modified as follows:

COURT APPOINTED COUNSEL FEES

__ The defendant shall pay court appointed counsel fees.

__ The defendant shall pay $____ Towards court appointed fees.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A __ Lump sum payment of $____ Due immediately, balance due

__ Not later than _____, or

__ In accordance __ (C), __ (D) below; or

B X Payment to begin immediately (may be combined with __ (C), __ (D) below); or

C __ Payment in equal _____ (E.g. weekly, *monthly*, quarterly) installments of $_____ To commence ____(E.g. 30 or 60 days) after the date of this judgment; or

D __ Payment in equal ___ (E.g. weekly, monthly, quarterly) installments of $_____To commence ___ (E.g. 30 or 60 days) after release from impris0 onment to a term of supervision. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. Probation Officer shall pursue collection of the amount due, and may request the court to establish or modify a payment schedule if appropriate 18 U.S.C. § 3572.

Special instructions regarding the payment of criminal monetary penalties:

__ The defendant shall pay the cost of prosecution.
__ The defendant shall pay the following court costs:
__ The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States District Court Clerk, 401 West Trade Street, Room 210, Charlotte, NC 28202, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. All criminal monetary penalty payments are to be made as directed by the court.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 05-4674

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

VICTOR A. RITA, JR.,
Defendant-Appellant.

Submitted: April 27, 2006
Decided: May 1, 2006

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. William L. Osteen, *District Judge*. (CR-04-105).

Before NIEMEYER and MOTZ, *Circuit Judges*, and HAMILTON, *Senior Circuit Judge*.

PER CURIAM:

Victor A. Rita appeals his jury conviction and sentence on charges of perjury, obstruction of justice and making false statements, in violation of 18 U.S.C. §§ 1623(a), 1001(a)(2), and 1503 (2000), respectively. Rita's sole issue on appeal is whether the sentence imposed by the district court was reasonable. Finding no reversible error, we affirm.

After the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), a sentencing court is no longer bound by the range prescribed by the sentencing guidelines. *See United States v.*

Hughes, 401 F.3d 540, 546-47 (4th Cir.2005) (noting after *Booker*, sentencing courts should determine the sentencing range under the guidelines, consider the other factors under § 3553(a), and impose a reasonable sentence within the statutory maximum). However, in determining a sentence post-*Booker*, sentencing courts are still required to calculate and consider the guideline range prescribed thereby as well as the factors set forth in 18 U.S.C. § 3553(a) (2000). *Id.* We will affirm a post-*Booker* sentence if it is both reasonable and within the statutorily prescribed range. *Id.* at 546-47. We have further stated that "while we believe that the appropriate circumstances for imposing a sentence outside the guideline range will depend on the facts of individual cases, we have no reason to doubt that most sentences will continue to fall within the applicable guideline range." *United States v. White*, 405 F.3d 208, 219 (4th Cir.), *cert. denied*, ___ U.S. ___, 126 S.Ct. 668, 163 L.Ed.2d 539 (2005). Indeed, "a sentence imposed 'within the properly calculated Guidelines range . . . is presumptively reasonable.'" *United States v. Green*, 436 F.3d 449, 457 (4th Cir.2006) (citing *United States v. Newsom*, 428 F.3d 685, 687 (7th Cir.2005), *cert. denied*, ___U.S. ___, 126 S.Ct. 1455, 164 L.Ed.2d 151, 2006 WL 271816 (2006)).

We find that the district court properly calculated the guideline range and appropriately treated the guidelines as advisory. The court sentenced Rita only after considering the factors set forth in § 3553(a). Based on these factors, and because the court sentenced Rita within the applicable guideline range and the statutory maximum, we find that Rita's sentence of thirty-three months' imprisonment is reasonable.

We therefore affirm Rita's conviction and sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed: May 1, 2006]

No. 05-4674
CR-04-105

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

VICTOR A. RITA, JR.,
Defendant-Appellant.

JUDGMENT

Appeal from the Unites States District Court for the Western District of North Carolina at Charlotte

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In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor

CLERK